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### A Hitchhikers' Guide to Comparative Tax Scholarship

Kim Brooks

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## A HITCHHIKER'S GUIDE TO COMPARATIVE TAX SCHOLARSHIP

by

Kim Brooks\*

### ABSTRACT

*Comparative law offers scholars a fascinating lens through which to discover new insights about the world, but only if we take on comparative law projects. Few legal scholars devote a substantial strand of their research to comparative study, and so their work fails to benefit from the active and prolonged debates in comparative law. This Article makes a singular, but hopefully substantial, contribution: it seeks to render more accessible the comparative law scholarship with the aim of facilitating easier access to comparative law insights for tax (and hopefully other) law scholars. Put another way, the Article seeks to engage tax comparatists (or would-be comparatists) in a “co-operative enterprise” where we are more likely to engage with each other with the “goal of improving understanding.” In short, it seeks to enhance the discipline of comparative tax law by enabling other tax scholars to write better comparative tax law scholarship.*

*The Article develops a taxonomy of the purposes of comparative tax scholarship. Understanding comparative tax law scholarship according to its purposes assists scholars in their thinking about how to make and evaluate decisions about their comparative choices. The purpose of a scholarly project dictates some, if not all, of the decisions*

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*about what and how things should be compared. Articulating and refining the purpose of a project achieves two goals for authors. First, it provides the scholar with a benchmark against which to make decisions about the scope of the inquiry; which units (countries) should be chosen; how many countries are necessary for comparison to be robust; and how detailed a knowledge of each country's tax laws, practices, and context is required for an effective study. These are the decisions that generate most of the debate among comparative law scholars. Second, and perhaps most importantly, it provides the scholar (and readers) with the ability to evaluate the quality of the work.*

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## **I. THE POTENTIAL OF COMPARATIVE TAX LAW SCHOLARSHIP**

The controversial claim of this Article is that most comparative tax scholarship is not very good. Perhaps surprisingly, it is hard to find explicit criteria for what constitutes good scholarship.<sup>1</sup> In a *Reality Bites*

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1. See Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 889 (1992) (claiming "[a]s legal academics, we are constantly engaged in the process of evaluating legal

kind of way, the general assumption is that scholars know good scholarship when they see it.<sup>2</sup> A standard answer is that scholarship involves the creation of new knowledge. But good scholarship presumably does more than that. Daniel Feldman, faculty of law at Cambridge University, offers a thoughtful list of ideals:

(1) a commitment to employing methods of investigation and analysis best suited to satisfying [the author's curiosity about the world]; (2) self-conscious and reflective open-mindedness, so that one does not assume the desired result and adopt a procedure designed to verify it, or even pervert one's material to support a chosen conclusion; and (3) the desire to publish the work for the illumination of students, fellow scholars or the general public and to enable other to evaluate and criticise it.<sup>3</sup>

One of the barriers to authoring robust comparative tax law scholarship is the unsettled nature of comparative law and the sophistication of the debates among comparative law scholars. For well over a century, comparative law scholars have debated the underlying theories that animate comparative law. Despite the longevity of the comparative law conversation and the gravitas of its participants, comparative law scholars have not cohered around an answer to even the basic question of whether comparative law is a distinct science or simply a method that can be applied in any area of jurisprudence.<sup>4</sup> Those ongoing disputes make approaching the discipline of comparative law daunting. When scholars avoid undertaking comparative work because of the added layer

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scholarship, but we have no theory of evaluation. . . . We conclude that a work of scholarship is good or bad, true or false, by intuition, trusting in some undefined quality of judgment.”).

2. See *Define Irony RB*, YOUTUBE (Sept. 25, 2015), <https://www.youtube.com/watch?v=7GM—22zOlw> [<https://perma.cc/826R-KJLZ>] (clip of Winona Rider's character in the movie *Reality Bites* saying, “I can't really define irony, but I know it when I see it”).

3. David Feldman, *The Nature of Legal Scholarship*, 52 MOD. L. REV. 498, 503 (1989).

4. See a discussion of these debates in Geoffrey Samuel, *Comparative Law and Jurisprudence*, 47 INT'L & COMPAR. L.Q. 817 (1998).

of grappling with not only the substantive area of law in which they are interested but also rich and unresolved comparative law debates, we miss the insights that might be gained from the experiences of others.

While the intensity of the differences of views in comparative law is palpable,<sup>5</sup> there is broad consensus about comparative law scholars' schools of thought.<sup>6</sup> It simplifies the spectrum of those schools, but in a way satisfactory to this Article, to describe the central debate of comparative law as between those who adhere to a functionalist view of comparative law and those who see law as deeply cultural. Scholars who adopt functional approaches to comparative law seek to identify the underlying social, economic, or political problem that law attempts to resolve. They then compare how different units (usually countries) settle those problems using law. Functionalism lends itself particularly well to the project of evaluating the effectiveness of different legal resolutions to common social, economic, or political problems. It is this advantage, namely, the ability to identify a preference for one legal resolution over another, that has led to criticisms of the approach as imperialist. The concern is that the comparatist who recommends one legal solution over another does so with insufficient understanding of the context of at least one of the jurisdictions being compared (generally the one in which they are an "outsider"). As a result, the comparatist risks falling into the trap of assuming one legal resolution is better than another either because they have insufficient contextual (or cultural) information or because they have implicit biases (based on familiarity) that lead them to favour one solution over another.

In the modern literature, commonly the "others" against whom functionalists are compared are scholars who take a hermeneutical or

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5. For an illustration of the strength of academic conviction in this field, see, for example, Alan Watson, *Legal Transplants and European Private Law*, 4 ELEC. J. COMPAR. L., Dec. 2000, <https://www.ejcl.org/44/art44-2.html> [<https://perma.cc/7FVT-DP5P>].

6. For excellent taxonomies of comparative law theories, see Jaakko Husa, *Research Designs of Comparative Law—Methodology or Heuristics?*, in THE METHOD AND CULTURE OF COMPARATIVE LAW: ESSAYS IN HONOUR OF MARK VAN HOECKE 53 (Maurice Adams & Dirk Heirbaut eds., 2014); see also the two standard comparative law encyclopaedias: THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019); ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW (Jan M. Smits ed., 2d ed. 2014); and the major collection of foundational comparative law works 1–2 COMPARATIVE LAW METHODOLOGY (Maurice Adams et al. eds., 2017).

cultural approach to comparative study. For those scholars, most quintessentially Pierre Legrand, hermeneutics avoids the imperialist potential of functionalism. The legal text is a manifestation of culture (like art or music) and is to be read as a signifier. Comparatists use that text not as a subject for comparison in and of itself but, instead, as the lens through which to gain access to information about the cultural setting within which that text is embedded. The focus of comparative work undertaken in the hermeneutical tradition is not to explain different legal systems: it is to understand (or try to understand) “the other.” In its more extreme forms, scholars in the hermeneutical tradition claim that some legal regimes are so culturally distinct that they cannot be compared. For example, Legrand has claimed that there is a fundamental cultural difference of mentality between civil and common law that precludes effective comparison.<sup>7</sup>

These conventional taxonomies of comparative law scholarship are not easily accessible to the non-comparatist. This is a concern for adherents to Feldman’s view of scholarly excellence. As Feldman observes:

There is a . . . problem if the author is writing not for the full community of legal scholars but only for a group within it. . . . He may then twist the language until it becomes almost unrecognisable, a sort of private code . . . [that] prevents knowledge and understanding being disseminated, confining it instead to a closed group.<sup>8</sup>

Tax comparatists who situate their scholarship against the conventional taxonomies risk speaking only to other tax comparatists, a small group. And the taxonomy itself risks alienating tax scholars (and graduate students) who might otherwise have made meaningful contributions if they were brave enough to approach comparative tax projects.

Comparative law offers scholars a fascinating lens through which to discover new insights about the world, but only if we take on comparative law projects. As Maurice Adams and Dirk Heirbaut a legal philosopher and a historian respectively, reflect, “[c]omparative law is

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7. See Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT’L COMPAR. L.Q. 52, 63 (1996).

8. Feldman, *supra* note 3, at 505.

a collection of methods that may be helpful in seeking answers to an almost endless variety of questions about law (broadly defined).”<sup>9</sup> Yet, few legal scholars devote a substantial strand of their research to comparative study, and so their work fails to benefit from the active and prolonged debates in comparative law.<sup>10</sup> This Article makes what I hope is a substantial contribution: it seeks to render more accessible the comparative law scholarship with the aim of facilitating easier access to comparative law insights for tax (and hopefully other) law scholars. It seeks to avoid the challenges of the “private code.”<sup>11</sup> And it seeks to engage tax comparatists (or would-be comparatists) in a “co-operative enterprise” where we are more likely to engage with each other with the “goal of improving understanding.”<sup>12</sup> In short, it seeks to enhance the discipline of comparative tax law by enabling other tax scholars to write better comparative tax law scholarship.

The major contribution of this Article is the development of a taxonomy of the purposes of comparative tax scholarship. It takes as its starting point tax scholar Omri Marian’s observation that, “[t]o date, there is no debate regarding the purposes of comparative taxation, and as long as we do not start questioning those purposes, there is little use in discussing methodologies.”<sup>13</sup> Understanding comparative tax law scholarship according to its purposes assists scholars in their thinking about how to make and evaluate decisions about their comparative choices. The ability not only to author meaningful work that reflects one’s curiosities but also to offer readers with an entry point for evaluation are among Feldman’s imperatives. The purpose of a scholarly project dictates some, if not all, of the decisions about what and how things should be compared. Articulating and refining the purpose of a project achieves two goals for authors: first, it provides the scholar with a benchmark against which to make decisions about the scope of the inquiry; which units (countries) should be chosen; how many countries are necessary for comparison to be robust; and how detailed a

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9. Maurice Adams & Dirk Heirbaut, *Prolegomena to the Method and Culture of Comparative Law*, in *THE METHOD AND CULTURE OF COMPARATIVE LAW*, *supra* note 6, at 1, 5–6.

10. This is the major complaint animating Omri Y. Marian, *The Discursive Failure in Comparative Tax Law*, 58 AM. J. COMPAR. L. 415 (2010).

11. Feldman, *supra* note 3, at 505.

12. *Id.* at 516.

13. Marian, *supra* note 10, at 469.

knowledge of each country's tax laws, practices, and context is required for an effective study. These are the decisions that generate most of the debate among comparative law scholars. Second, and perhaps most importantly, it provides the scholar (and readers) with the ability to evaluate the quality of the work.<sup>14</sup>

This approach to creating a taxonomy of comparative tax work aligns with Annelise Riles's insight that part of what has distinguished comparative law scholarship is its emphasis on projects.<sup>15</sup> Riles does not appear to argue for projects as a normative matter; instead, she identifies a commitment to various projects (identified through articulated or assumed purposes) as a distinguishing feature of the work of the masters of comparative law.<sup>16</sup> Most tax scholars who rely on comparison in their scholarship do so in aid of a tax law project; the question is what are the purposes of those projects? And the claim of this Article is that if we could speak about the purposes of comparative tax law in an accessible way—a way that engages the full community of scholars and not just a small group—we could enhance the quality of comparative tax scholarship.

The purposes identified in this Article are drawn from a review of the comparative tax law literature. To create the taxonomy, I identified as many comparative tax law contributions as possible. Finding comparative tax scholarship is more difficult than might initially be imagined. There is no easy search phrase that identifies all work since many tax scholars do not use the phrase "comparative tax" in their scholarship. Instead, work needed to be identified by culling through thousands of tax contributions, monographs, articles, and chapters. Notable, and tragically, many publications are only accessible behind a pay-wall, and current academic life precludes accessing them. Given the

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14. For an analysis of how identifying the scholarship's audience might assist in evaluating its effectiveness, see Jürgen Basedow, *Comparative Law and Its Clients*, 62 AM. J. COMPAR. L. 821 (2014).

15. Annelise Riles, *Introduction* to RETHINKING THE MASTERS OF COMPARATIVE LAW 1, 11 (Annelise Riles ed., 2001) ("[e]qually important to the comparative lawyer from the outset were the *projects* comparative law as a discipline might serve—the unification of law, the development of a 'universal common law' for transnational business and other relations, the uses of comparative information about foreign legal systems for legal reform projects. . . . The comparative lawyer is a person who engages comparison for a purpose. . . ." (footnote omitted)).

16. *Id.*



imperfect means for identifying material, the Article makes no claim to having identified the complete dataset; undoubtedly, I have missed contributions. A minor contribution of this Article is the collection of this bibliographic work which is reflected in the extensive footnotes within each part. This literature has not otherwise been made available in a collected form, and the dataset will hopefully prove valuable to scholars who seek to take on comparative projects.

There were some limits on the work selected for review. First, with a few French exceptions, I reviewed scholarship by academics authored only in English. While that undoubtedly restricts my ability to draw conclusions about the “field” of comparative tax law work, it hampers this study less than in other areas of law since a surprising amount of tax scholarship is conducted in English, even if the author’s original language is German, French, or Italian, for example. Second, I focused on work by academics and ignored work by institutions (like the Organisation for Economic Co-operation and Development (OECD)) or practitioners. I made that decision because the objective of this Article is to create a taxonomy for comparative tax law scholarship. While some institutions and practitioners produce work that might be described as scholarship, the risk of expanding the pool is undue emphasis on comparison for the purpose of tax planning. Written work designed to support tax planning may be valuable for individual clients, including governments, who seek to understand how tax systems work in tandem or by comparison, but that work is not produced with the objective of adding something new to the literature, nor is it intended to be responsive to the kind of orientation suggested by Feldman.<sup>17</sup> Third, I focused on recent work, generally work that was authored after 1990. Important work was completed before 1990, but the focus of this Article is to create a taxonomy that might also inform future tax law scholarship. Fourth, again with some modest exceptions, I focused on work authored in the field of law, as opposed to accounting, economics, sociology, or public finance. There would be value in exploring interdisciplinary comparative tax work and limiting the review to law risks falsely suggesting that tax law scholarship can be cleanly distinguished from tax scholarship produced by authors in other disciplines. Still, part of the peculiarity of law is our attachment to formal legal rules, particularly those expressed in legislation and case law. Finally, I selected work that was primarily devoted to the comparative tax law project. Where an

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17. Feldman, *supra* note 3.

author simply offered a fragmented comparison in an illustrative way in a piece that was essentially non-comparative in nature, it was excluded on the grounds that it would not offer much by way of insight into comparativism.

Following this introduction, this Article proceeds in three major sections, followed by a conclusion. Parts II, III, and IV offer a taxonomy of the purposes of comparative tax law scholarship. Those purposes are divided into three broad categories based on the overarching type of scholarship. The first category captures purposes that are primarily descriptive or doctrinal in orientation. Scholars in this category use comparative law as a way of better understanding (and offering new conceptual or analytical insights about) tax law. The second category captures scholarship with largely normative purposes, whether to improve tax laws by drawing from the experiences of other jurisdictions or to deploy tax as a mechanism for advancing high-order values. Explanatory purposes motivate the third category of scholarship. In this scholarship, the author uses comparativism to generate new insights into why tax systems (or aspects of them) are the same or different or uses tax law to explain aspects of our social realities. I chose these categories because they are broadly familiar to all legal scholars, so hopefully they move away from the tendency to engage in comparative discussions amongst only an insider group.

The purposes reviewed in Part II are, for the most part, not unique to tax and might just as easily be applied to any comparative law subject. To that end, it is hoped that this Article will serve useful for scholars in any area of law who want to expand the questions they ask through the vehicle of comparative study. Although the taxonomy may apply to legal scholarship beyond tax, there are some aspects of tax law that might make comparative work in tax law more coherent as a body of work. First, tax is imposed by statute. This narrows some of the institutional differences between countries in terms of the origins of the fundamental legal framework. Second, tax scholars widely agree on the criteria that might be used to evaluate an effective tax system: equity, neutrality, and administrability. There are, of course, other evaluative criteria that are drawn upon in the scholarship (for example, fairness, equality, privacy, transparency, or competitiveness), and there are variations in what each of these evaluative criteria demand, but, in the main, there is likely more agreement on the appropriate evaluative criteria in tax law than in many other areas of legal study. This (relatively) shared understanding of the criteria for evaluating tax laws may narrow debate about desirable tax law design. Third, there is significant consensus on

the role and function of taxation. Most countries accept that tax systems are designed to raise revenue, redistribute income, promote or discourage particular types of behaviour, compensate for market failures, stabilize the economy, and promote economic growth. Again, this (relatively) shared understanding may restrict disagreement among scholars about higher-order values or the desirable policy outcomes.

The purposes of comparative tax scholarship are not as distinct as the taxonomy suggests. Some authors, in fact most, will seek to achieve two or three of the identified purposes, although often one seems to dominate the project. Part of the claim of this Article, however, is that scholars would enhance the focus and effectiveness of their comparative tax projects if they were clearer about their purposes.

Before turning to the taxonomy, this section concludes with a final reflection on the relationship between the taxonomy of comparative tax purposes presented in this Article and the competing schools of thought in comparative law more generally. As already noted, the aims of this Article are to make approaching comparative tax work easier for legal (tax) scholars, to find and offer some conceptual clarity about the comparative tax work previously undertaken, and to provide some illustrative comparative tax “projects” from which scholars can learn. Choosing to focus the discussion on the purposes of comparative tax law instead of the schools of thought reflected in the work to date does not ignore those debates. Instead, it reframes those debates by understanding them to operate on two levels.

First, on one level, the issue of the school of thought to which a scholar adheres is likely aligned with that scholar’s view about the nature of law. Put another way, comparative law debates often echo jurisprudential debates. Becoming a better comparative law scholar may be as much about being explicit about whether one is a positivist as it is about being explicit about one’s adherence to functionalism.

On a second level, the comparative law schools of thought debates may be framed as being about what makes “good” comparative law. Some scholars believe that scholars need to know a substantial amount about the comparative jurisdictions, while others believe that outsiders can use comparative insights in defensible ways. This Article advances the position that the ability of a comparatist to meaningfully engage in comparative work, given the limits of that person’s knowledge of jurisdictions other than their home jurisdiction, might be better characterized as a debate about the degree to which comparisons are helpful in achieving the purpose for which they are used. On the one extreme, if I know little about the legal rules and social, political, economic, and

cultural context of jurisdiction *A*, my comparative work between it and jurisdiction *B* might be inconsequential and trivial—not worth undertaking. At the other extreme, there are presumably a limited number of purposes that would demand I become so familiar with jurisdiction *A* that I can adopt it also as a home jurisdiction (or as an insider). In other words, it might make more sense to think about the issue of cultural (or any other kind of) familiarity with a jurisdiction as less about a threshold point one has to reach in order to undertake *any* comparative project, which is the claim made at the extreme end by those who endorse a hermeneutical approach to comparative work, and to think carefully about the immersion required to achieve the stated objectives and purposes of the research work undertaken. This seems aligned with the standard debates in any social science method that requires the researcher to be able to sufficiently support the claims they make. Some claims will require high levels of information and understanding about the context; other claims will require less information and understanding. It is for these additional reasons that focusing on the purpose of a scholar's comparative project seems more fruitful than focusing on the scholar's alignment with the standard taxonomy of comparative law schools.

## II. DOCTRINAL COMPARATIVE TAX SCHOLARSHIP

Comparative tax scholarship might be described within three broad categories: scholarship that advances our understanding of legal doctrine; scholarship that seeks improved legal outcomes or the spread of high-order values (normative); and scholarship that explains why tax laws look the way they do and how they influence the world (explanatory). For each of the broad scholarly purposes within those categories, I review a contribution that provides a helpful illustration of a scholar achieving that purpose. I have taken this approach because, as Jaakko Husa assesses, “Most textbooks give methodological advice and offer hints, but there is no intimate link to the research process. This is partly due to the heuristic nature of comparative law, which means getting acquainted with exemplary research ([i.e.,] good books and articles) and learning from them is of great importance.”<sup>18</sup> An additional aim of this approach is to provide a “reading list” for those who want to survey a range of comparative tax law scholarship; a curious graduate student,

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18. Husa, *supra* note 6, at 66.

for example, could collect and read this work and have a good overview of the kinds of scholarship pursued by comparative tax scholars.

Several purposes of comparative tax law are not included as part of this review, although they generate substantial written material. Some comparative tax law is motivated by the purposes of assisting practitioners to speak with foreign lawyers, to tax plan effectively, or to assess how different countries' tax laws interact. Given that these purposes have not been embraced in the scholarly literature (and are not usually the subject of scholarship in the academic sense), they are not highlighted. And, it likely goes without saying and therefore it is not considered as a distinct purpose below, that a motivation for all comparative tax law scholarship is the joy of studying other countries' tax laws.

A final preliminary note about "law." This Article refers to comparative tax "law." Most commonly for tax lawyers, law invokes the legislative framework that imposes the tax in issue. However, comparative tax law can have a much wider usage. For some scholars it includes the fuller range of positive law—cases and administrative guidance. It may also include the functioning of tax actors and institutions. Finally, in its broadest (and most cultural) sense, it can include context like citizens' attitudes about government, collection practices, and forms of "tax" that may not be generally considered to be taxes in a western legal understanding.

One strand of scholarship has as its core purpose to facilitate our understanding of legal doctrine. This work is often descriptive, although it may also advance conceptual or analytical clarity about the law. When comparative tax scholarship of this type is well done, it does more than simply describe the tax laws of the chosen jurisdictions; instead, it offers a meaningful comparison of those laws. The scholar may do that by identifying and comparing the underlying social or economic problem to be resolved by the tax laws in question (in the functionalist tradition) or by conceptualizing the way countries have designed their tax laws in a way that reveals the alternative possible approaches to the tax policy decisions that need to be made in the design of the tax framework. When this work is done badly, it inaccurately describes the laws of one or more of the countries (often because the scholar is under-educated about that jurisdiction); it describes the approach taken in the identified countries without actually comparing it (for example, by describing the law of one country and then the law of another without doing the harder work of figuring out how those laws are the same or different); or the work is written without context to help the reader understand the contribution the author is making (why the comparison

matters). Work in this vein seeks to achieve one or more of three purposes: to assist us in learning more about our own systems, to learn more about another country's system, or to facilitate a better understanding of the generalizable features of tax system design.

*A. Purpose 1: To Learn More About Our Own System and Context*

One of the best ways to understand something is to compare it to something else: the exercise of comparison can reveal aspects of the thing that were otherwise invisible. The object chosen for comparison in this context matters only to the extent that it is useful in revealing something more about the familiar thing.

Some comparative tax law scholarship is undertaken as a means of better understanding the tax law of the home jurisdiction of the scholar.<sup>19</sup> As claimed by Kurt Hanns Ebert, a "profound understanding of one's own system of law is available only to those lawyers who use the method of comparative law."<sup>20</sup> Additionally, one might hope that exposure to that which is profoundly different from what one is used to must of necessity change what one is including in one's perspectives and opinions.<sup>21</sup>

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19. For work motivated by this purpose, see, for example, William B. Barker, *A Comparative Approach to Income Tax Law in the United Kingdom and the United States*, 46 CATH. U. L. REV. 7 (1996); John C. Chommie, *Why Neglect Comparative Taxation?*, 40 MINN. L. REV. 219 (1956); Stephen Bruce Cohen, *Does Brummeria Sweep Clean? A US Tax-Law Perspective*, 126 S. AFR. L.J. 489 (2009); LUC DE BROE, *INTERNATIONAL TAX PLANNING AND PREVENTION OF ABUSE: A STUDY UNDER DOMESTIC TAX LAW, TAX TREATIES AND EC LAW IN RELATION TO CONDUIT AND BASE COMPANIES* (2008); Edward Kofi Osei, *Transfer Pricing in Comparative Perspective and the Need for Reforms in Ghana*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 599 (2010).

20. As quoted in and translated by A. Kh Saidov, *Comparative Law and Law-Making*, 2 J. COMPAR. L. 67, 67 (2007) (quoting KURT HANNS EBERT, *RECHTSVERGLEICHUNG: EINFÜHRUNG IN DIE GRUNDLAGEN* 71 (1978)).

21. Although there may be reasons not to be so hopeful, Riles's exploration of how three years in Japan, learning the language, and engaging in serious academic study changed John Wigmore suggests that comparative study is not always fruitful in this regard. She concludes, "[n]ot only did Wigmore emerge from his sojourn in Japan with most of the same views with which he began, but there was much that I found troubling about both the content of those views and the genre in which they found expression."

Ajay Mehrotra's *The Public Control of Corporate Power: Revisiting the 1909 US Corporate Tax from a Comparative Perspective* is a wonderful illustration of this kind of approach to comparative study.<sup>22</sup> Mehrotra, executive director and research professor at the American Bar Foundation and Professor of Law at Northwestern Pritzker School of Law, asks why the U.S. federal government adopted a corporate excise tax in 1909 with its unique features, including a classical approach to the taxation of dividends that provides no credit to shareholders for the underlying corporate tax paid.<sup>23</sup> He claims there are two dominant stories: one about "how populist and progressive anxieties about the growth of corporate power and prevailing juridical conceptions of corporate personality led . . . to [the] use [of] the tax as a regulatory tool to publicize and control the wealth and power of corporate managers and owners."<sup>24</sup> The other account was that "the corporation [w]as simply an aggregation of individuals . . . [and] lawmakers used the corporation primarily to raise revenue."<sup>25</sup> A review of the development of other U.S. taxes around the time of the corporate excise tax, and the political and legal context in the U.S. alone, reveals no clear answer to which story has more explanatory power.

Mehrotra's creative solution to break the tie between competing stories is comparative tax. His comparative research is useful in answering which story better explains the U.S. corporate tax trajectory because the experiences of states and other countries with the imposition of corporate-level taxes sheds light on the U.S. federal government's path. Mehrotra identifies an admittedly small sample—a few representative US state governments, Britain, and Germany—as comparators.<sup>26</sup>

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Annelise Riles, *Encountering Amateurism: John Henry Wigmore and the Uses of American Formalism*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW*, *supra* note 15, at 94, 95.

22. Ajay K. Mehrotra, *The Public Control of Corporate Power: Revisiting the 1909 U.S. Corporate Tax from a Comparative Perspective*, 11 *THEORETICAL INQUIRIES L.* 491 (2010).

23. *Id.*

24. *Id.* at 494.

25. *Id.* at 495.

26. He justifies this selection "[f]or the sake of brevity," although it seems that the selection presumably offers sufficient counter-narratives to be useful in supporting his effort both to evaluate the competing narratives explaining the design of the corporate excise tax and to speculate about how the U.S. corporate tax may evolve in the future. *Id.* at 495–96.



Ultimately, Mehrotra determines that much of the United States' decision to tax corporations can be explained by its interest in disciplining corporate capital as a result of "antipathy toward concentrated power."<sup>27</sup> He comes to that conclusion by exploring how the taxation of corporations evolved in the U.S. states, United Kingdom, and Germany.<sup>28</sup> In the U.S. states, despite wide divergence of approaches, Mehrotra observes that "lawmakers and taxing authorities consistently kept corporations at the center of state-level tax policy."<sup>29</sup> He found this to be the case regardless of whether the political leaders shared a conception of the corporation (as a separate entity or as a representative body for its owners).<sup>30</sup> He also found that "U.S. lawmakers were steeped in a political culture that had long been suspicious of monopoly power."<sup>31</sup>

The United Kingdom and Germany presented counter-narratives to the evolution of the United States' position on the taxation of corporations. Mehrotra's historical review suggests there were three important differences in the U.K. approach to corporations.<sup>32</sup> First, the United Kingdom took a very different approach to the design of management structures—relying more on family businesses than professionalized managers and understanding the corporation as a kind of nominee for its owners.<sup>33</sup> Second, Mehrotra argues the British civil service tradition resulted in more integration between the public and private sectors.<sup>34</sup> Finally, he notes that the United Kingdom was slower to adhere to a view of the corporation as a separate legal entity.<sup>35</sup>

Germany's history falls somewhere between the United States and United Kingdom.<sup>36</sup> Germany embraced the notion that corporations were separate personalities, a position more aligned with the U.S. federal government position, which was seen to generate more anxiety about economic concentration. However, like the United Kingdom, Germany had a strong civil service and bureaucratic arm that reduced the

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27. *Id.* at 532.

28. *Id.* at 496.

29. *Id.* at 508.

30. *Id.*

31. *Id.* at 514–15.

32. *Id.* 517–24.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* 524–31.



significance of the public and private distinction in corporate ownership and control.<sup>37</sup>

Not surprisingly given Mehrotra's purpose, his conclusions do not attempt to explain the comparator jurisdictions—Germany, United Kingdom, or the individual states. That's because the comparative work he undertakes in the article, which includes a detailed review of the emergence of corporate tax regimes in those jurisdictions, is not undertaken with a view to drawing conclusions about them. It is undertaken with the objective of using that history to evaluate the possible explanations for the U.S. approach. Extrapolating from the trajectory of corporate taxation elsewhere, Mehrotra gives priority to the claim that the original design of the U.S. corporate tax, which has proven to create some path-dependency, was motivated in large measure by efforts to discipline corporate capital.<sup>38</sup> He argues that this history likely explains the stickiness of some of the design features of the U.S. corporate tax and speculates that the United States is unlikely to be able to implement regressive taxation—like a Value Added Tax—because the “blindness of punitive progressive corporate taxes may have foreclosed the contingent possibilities of other forms of tax and transfer systems.”<sup>39</sup>

The article is a model because the jurisdictions Mehrotra selects and his analysis of their histories prove sufficient for him to evaluate competing theories about U.S. corporate tax law and to render aspects of the United States' corporate tax trajectory visible in ways that were not obvious in the absence of the comparative context. More generally, as his article suggests, the number and type of countries chosen with the purpose of revealing something about the author's home jurisdiction will depend on the aspect of the tax system the author seeks to better understand. In this case, because of the different historical trajectories of the United Kingdom and Germany, two countries seem sufficient to demonstrate the competing historical, political, and institutional factors that might explain why different approaches to corporate taxation were adopted in that tax's early days. Mehrotra has produced useful work, even though he would likely not consider himself an “insider” to the United Kingdom or Germany.

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37. *Id.*

38. *Id.*

39. *Id.* at 532.

*B. Purpose 2: To Learn More About Others' Systems and Context*

In contrast to Mehrotra's article, which seeks to use comparative law scholarship to reveal something new about an already-familiar system, other scholars use comparative tax law as a means of learning more about others' systems.<sup>40</sup> Alain Charlet's *The VAT and Customs Treatment of the Mining Industry in Sub-Saharan Africa* is an illustration

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40. For illustrations of scholarship authored with a view to this purpose, see, for example, Paolo Arginelli & Michael Dirkis, *Revisiting and Reviewing "Reservations", "Observations" and "Positions" to the OECD Model—Selected Provisions: OECD Member Countries*, in DEPARTURES FROM THE OECD MODEL AND COMMENTARIES: RESERVATIONS, OBSERVATIONS AND POSITIONS IN EU LAW AND TAX TREATIES 135 (Guglielmo Maisto ed., 2014); Steven J. Arsenault, *A Tale of Two Taxes: A Comparative Examination of the Individual Income Tax in the United States and the People's Republic of China*, 12 RICH. J. GLOB. L. & BUS. 453 (2013); Marco Barassi, *The Notion of Tax and the Different Types of Taxes: Comparative Approach*, in THE CONCEPT OF TAX 59 (Bruno Peeters ed., 2005) (table of contents lists Lorenzo del Federico as article co-author); Peter Behrens, *General Principles of Residence of Companies: A Comparative Analysis of Connecting Factors Used for the Determination of the Proper Law of Companies*, in RESIDENCE OF COMPANIES UNDER TAX TREATIES AND EC LAW 3 (Guglielmo Maisto ed., 2009); Marc Bourgeois, *Constitutional Framework of the Different Types of Income*, in THE CONCEPT OF TAX, *supra*, at 79; Marc Bourgeois, *Secondary Consequences of the Distinction Between Taxes and the Other Modes of Financing Government Expenditure*, in THE CONCEPT OF TAX, *supra*, at 185; Kim Brooks, *International Tax Policy: The Counter-Story Presented by the BRICS*, in BRICS AND THE EMERGENCE OF INTERNATIONAL TAX COORDINATION 447 (Yariv Brauner & Pasquale Pistone eds., 2015); Karen B. Brown, *Comparative Regulation of Corporate Tax Avoidance: An Overview*, in A COMPARATIVE LOOK AT REGULATION OF CORPORATE TAX AVOIDANCE 1 (Karen B. Brown ed., 2012); A COMPARATIVE LOOK AT REGULATION OF CORPORATE TAX AVOIDANCE (Karen B. Brown ed., 2012); TAXATION AND DEVELOPMENT—A COMPARATIVE STUDY (Karen B. Brown ed., 2017); Mark Burton & Miranda Stewart, *Promoting Budget Transparency Through Tax Expenditure Management: A Report on Country Experience for Civil Society Advocates* (Univ. of Melbourne, Legal Studies Research Paper No. 544, 2011), [http://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0010/1550665/Burton\\_Stewart\\_2011\\_SSRN-id186432411.pdf](http://law.unimelb.edu.au/_data/assets/pdf_file/0010/1550665/Burton_Stewart_2011_SSRN-id186432411.pdf) [<https://perma.cc/F3NS-4RAK>]; Vikram Chand, *Exit Charges for Migrating Individuals and Companies: Comparative and Tax Treaty Analysis*, 67 BULL. FOR INT'L TAX'N, no. 4/5, 2013, at 1; Alain Charlet, *The VAT and Customs Treatment of the Mining Industry in Sub-Saharan Africa*, in TAX DESIGN ISSUES WORLDWIDE 205

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(Geerten M.M. Michiels & Victor Thuronyi eds., 2015); BERIC CROOME, TAXPAYERS' RIGHTS IN SOUTH AFRICA (2010); Maurice C. Cullity, *Notional Property: A Comparative Survey of the Provisions of the Western Australian and Federal Death Tax Statutes*, 11 U.W. AUSTL. L. REV. 301 (1974); Justin Dabner, *Tax Consolidation Regimes—Australia and Japan Compared*, 6 ASIA-PAC. J. TAX'N 98 (2002); Kalmen Datt et al., *GST/VAT General Anti-Avoidance Approaches: Some Preliminary Findings from a Comparative Study of Australia and South Africa*, 32 AUSTL. TAX F. 377 (2017); Cyrille David, *General Introduction to TAX TREATMENT OF FINANCIAL INSTRUMENTS: A SURVEY TO FRANCE, GERMANY, THE NETHERLANDS, AND THE UNITED KINGDOM* 1 (Geerten Michiels ed., 1996); Luc De Broe, *Corporate Tax Residence in Civil Law Jurisdictions*, in RESIDENCE OF COMPANIES UNDER TAX TREATIES AND EC LAW, *supra*, at 95; Luc De Broe, *The Meaning of “Enterprise”, “Business” and “Business Profits” in Domestic Tax Law*, in THE MEANING OF “ENTERPRISE”, “BUSINESS” AND “BUSINESS PROFITS” UNDER TAX TREATIES AND EU TAX LAW 31 (Guglielmo Maisto ed., 2011); Daniel Deak et al., *Adjustment of the Tax Systems of the New Accession States to the “Acquis Communautaire” in Direct Taxation*, in EU FREEDOMS AND TAXATION 261 (Frans Vanistendael ed., 2006); Rik Deblauwe et al., *Gift and Inheritance Tax with Regard to Charities*, in TAXATION OF CHARITIES 87 (Frans Vanistendael ed., 2015); Tom Delany, *Tax Avoidance: A Trans-Tasman Comparative Study*, 11 N.Z. J. TAX'N L. & POL'Y 161 (2005); Alyssa A. DiRusso, *American Nonprofit Law in Comparative Perspective*, 10 WASH. U. GLOB. STUD. L. REV. 39 (2011); Thomas Dubut, *The International Tax Policy of the Least Developed Countries: The Case of the Partner States of the East African Community—Burundi, Kenya, Rwanda, Tanzania and Uganda*, in BRICS AND THE EMERGENCE OF INTERNATIONAL TAX COORDINATION, *supra*, at 327; Stefan N. Frommel, *The Right of Taxpayers to Remain Silent Under the European Convention on Human Rights*, in TAXPAYER PROTECTION IN THE EUROPEAN UNION 81 (Dirk Albregtse & Henk van Arendonk eds., 1998); F. Alfredo García Prats, *Impact of the Position of the BRICS on the UN Model Convention*, in BRICS AND THE EMERGENCE OF INTERNATIONAL TAX COORDINATION, *supra*, at 393; Hans Gribnau & Melvin Pauwels, *General Report*, in RETROACTIVITY OF TAX LEGISLATION 41 (Hans Gribnau & Melvin Pauwels eds., 2013); Bernhard Grossfeld & James D. Bryce, *A Brief Comparative History of the Origins of the Income Tax in Great Britain, Germany and the United States*, 2 AM. J. TAX POL'Y 211 (1983); Daniel Gutmann, *General Report*, in CORPORATE INCOME TAX SUBJECTS 1 (Daniel Gutmann ed., 2015); Anna-Marie Hambre, *Tax Confidentiality in Sweden and the United States—A Comparative Study*, 43 INT'L J. LEGAL INFO. 165 (2015); Sigrid Hemels, *Tax Incentives for the Art Market*, in TAX INCENTIVES FOR THE CREATIVE INDUSTRIES 175 (Sigrid Hemels & Kazuko Goto eds., 2017); Sigrid Hemels, *Tax Incentives for the Audio Visual Industry*, in TAX INCENTIVES FOR

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THE CREATIVE INDUSTRIES, *supra*, at 137; Geoffrey Hornsey, *Corporate Taxation—A Comparative Study*, 16 MOD. L. REV. 26 (1953); Domingo Jesús Jiménez-Valladolid de L'Hotellerie-Fallois & Félix Alberto Vega Borrego, *Legal Personality, Limited Liability and CIT Liability*, in CORPORATE INCOME TAX SUBJECTS, *supra*, at 17; Heike Jochum & Aikatarini Savvaidou, *Deduction of Gifts and Contributions and Other Tax Incentives in the PIT and CIT for Non-Profit Entities or Activities*, in TAXATION OF CHARITIES, *supra*, at 61; Polina Kouraleva-Cazals, *Atypical Entities and the Personal Scope of the Corporate Income Tax*, in CORPORATE INCOME TAX SUBJECTS, *supra*, at 75; Michael Lang, *Union Law and OECD Model Concepts: What Can We Learn from the Comparison?*, in DEPARTURES FROM THE OECD MODEL AND COMMENTARIES, *supra*, at 73; Moris Lehner, *The European Experience with a Wealth Tax: A Comparative Discussion*, 53 TAX L. REV. 615 (2000); Guglielmo Maisto & Jacques Malherbe, *General Report*, in TAXATION OF COMPANIES ON CAPITAL GAINS ON SHARES UNDER DOMESTIC LAW, EU LAW AND TAX TREATIES 3 (Guglielmo Maisto ed., 2013); Guglielmo Maisto, *Introduction to MULTILINGUAL TEXTS AND INTERPRETATION OF TAX TREATIES AND EC TAX LAW* xxi (Guglielmo Maisto ed., 2005); Jacques Malherbe, *Administrative Tax Surcharges and the Proportionality Principle*, in SURCHARGES AND PENALTIES IN TAX LAW 65 (Roman Seer & Anna Lena Wilms eds., 2016); Craig A. Max IV, *Hand-Holding, Brow-Beating, and Shaming into Compliance: A Comparative Survey of Enforcement Mechanisms for Tax Compliance*, 40 VAND. J. TRANSNAT'L L. 541 (2007); Joel S. Newman, *A Comparative Look at Three British Tax Cases*, 67 TAX NOTES 1509 (June 12, 1995); Angelo Nikolakakis, *The Common Law Perspective on the International and EC Aspects of Groups of Companies*, in INTERNATIONAL AND EC TAX ASPECTS OF GROUPS OF COMPANIES 21 (Guglielmo Maisto ed., 2008); Włodzimierz Nykiel & Malgorzata Sęk, *General Conference Report on Taxpayer Protection*, in PROTECTION OF TAXPAYER'S RIGHTS: EUROPEAN, INTERNATIONAL AND DOMESTIC TAX LAW PERSPECTIVE 367 (Włodzimierz Nykiel & Malgorzata Sęk eds., 2009); Xavier Oberson et al., *The Impact of the Prohibition of Discrimination and Restriction Granted Under the EC Treaty in Non-EU States (Switzerland and Norway)*, in EU FREEDOMS AND TAXATION, *supra*, at 221; RENÉ OFFERMANN, THE ENTREPRENEURSHIP CONCEPT IN A EUROPEAN COMPARATIVE TAX LAW PERSPECTIVE (2002); Stefan Olsson, *Non-Resident Entities and CIT*, in CORPORATE INCOME TAX SUBJECTS, *supra*, at 71; Ole Gjems Onstad & Peter Melz, *NPOs (Charities) and VAT*, in TAXATION OF CHARITIES, *supra*, at 75; Henry Ordower, *Comparative Law Observations on Taxation of Same-Sex Couples*, 111 TAX NOTES 229 (Apr. 10, 2006); Edward Pechler, *Fiscal Administrative Sanctions*, in TAXPAYER PROTECTION IN THE EUROPEAN UNION, *supra*, at 75; Bart Peeters, *Classification of Foreign Entities for Corporate Income Tax Purposes*, in CORPORATE INCOME TAX SUBJECTS, *supra*, at 59; María Teresa Soler Roch, *Introduction to*

of this purpose.<sup>41</sup> Charlet is an attorney in France, who also teaches in a number of universities and regularly engages in research work. His article is typical of this type of comparative tax law scholarship. In his chapter, he primarily describes Value Added Tax practices in Sub-Saharan African countries, particularly in francophone West and Central Africa.<sup>42</sup> As he claims, “[t]his paper outlines some of the VAT and customs issues relevant to mining taxation.”<sup>43</sup> Although he purports to

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FAMILY TAXATION IN EUROPE 1 (María Teresa Soler Roch ed., 1999); Alan Schenk, *The Canadian White Paper on Sales Tax Reform and the Model Value Added Tax Statute for the United States: A Comparative Analysis*, 26 OSGOODE HALL L.J. 629 (1988); Jonathan Schwarz, *Taxation of Immovable Property from a Common Law Perspective*, in IMMOVABLE PROPERTY UNDER DOMESTIC LAW, EU LAW AND TAX TREATIES 11 (Guglielmo Maisto ed., 2015); Walter Schwidetzky & Rolf Eicke, *Income Taxation in the United States and Germany: The Rugged Individualist Meets the Social Activist*, 27 J. TAX’N INV., Summer 2010, at 3; Roman Seer & Isabel Gabert, *General Report*, in MUTUAL ASSISTANCE AND INFORMATION EXCHANGE 23 (Roman Seer and Isabel Gabert eds., 2010); Pietro Selicato, *Searching for Neutrality of Corporate Income Tax in the EU Member States*, in CORPORATE INCOME TAX SUBJECTS, *supra*, at 117; A.V. Serebrennikova et al., *Legal Comparative Analysis of Main Specific Features of Tax Crimes in Russia and Germany*, 8 TURKISH ONLINE J. DESIGN ART & COMM’N, Mar. 2018 special ed., at 451; HARRISON B. SPAULDING, *THE INCOME TAX IN GREAT BRITAIN AND THE UNITED STATES* (1927); John Tiley, *Judicial Anti-Avoidance Doctrines: The US Alternatives*, 1987 BRIT. TAX REV. 180; John Tiley, *Judicial Anti-Avoidance Doctrines: The US Alternatives—Part II*, 1987 BRIT. TAX REV. 220; John M. Ulmer & Francesco Avella, *Capital Gains on Shares Under Reorganizations*, in TAXATION OF COMPANIES ON CAPITAL GAINS ON SHARES UNDER DOMESTIC LAW, EU LAW AND TAX TREATIES, *supra*, at 123; Frans Vanistendael, *General Report*, in THE EC INTEREST SAVINGS DIRECTIVE 29 (Frans Vanistendael ed., 2015); Frans Vanistendael, *Group Taxation Under Domestic Law: Common Law Versus Civil Law Countries*, in INTERNATIONAL AND EC TAX ASPECTS OF GROUPS OF COMPANIES, *supra*, at 45; Jan van de Streek, *Does Company Size Matter in Defining the Scope of a CIT?*, in CORPORATE INCOME TAX SUBJECTS, *supra*, at 35; Antoinette van Rijn, *A Comparative Study of Taxpayer Protection in Five Member Countries of the European Union*, in TAXPAYER PROTECTION IN THE EUROPEAN UNION, *supra*, at 45; Hein Vermeulen, *Investment Structures*, in CORPORATE INCOME TAX SUBJECTS, *supra*, at 87.

41. Charlet, *supra* note 40.

42. *Id.* at 205.

43. *Id.* at 207.

also offer some views on best practices, in fact, the chapter offers at most ambivalent views on best practices, and Charlet concludes that “often there is no good or bad rule; no one size-fits-all approach.”<sup>44</sup>

One of the interesting features of Charlet's chapter is his organization of the analysis (and description) by reference to the stage in the mining process, rather than by organization of typical VAT legislation. In other words, Charlet designs the chapter by starting with the industry (mining) and by discussing how the VAT applies at its various development stages (exploration, development, and production). The details of individual country's laws are embedded in thick and detailed footnotes with the text reserved for generalizations based on those specifics. Overall, the chapter provides the reader with a good sense of the ways in which VAT law has been applied to the mining sector in francophone West and Central Africa. It is typical of this kind of comparative tax law because Charlet makes no effort to compare the law of “other” countries with his home jurisdiction, France. The comparison among countries is entirely undertaken from the vantage point of a knowledgeable outsider.

The general limits of pursuing work with this purpose are obvious from Charlet's chapter. He does not draw conclusions about political, social, economic, or cultural contexts. That might be possible if the scholar intended to spend significant time and devote considerable study to another country, but as a general matter, it is unlikely that many scholars will have the time or funding to do so. Second, Charlet's analysis is tightly drawn around the design of the tax laws themselves, with some occasional observations about the institutional context in which those laws were adopted. A scholar could learn enough about the jurisprudence, institutional structures, or tax administrative practices to offer observations about those aspects of tax law as part of work that seeks to better understand other jurisdictions; although a review of the work undertaken with this purpose reveals that it is rarely the case that they do so. Finally, prescriptive work as it relates to other jurisdictions is rare and risky. Charlet is not prescriptive about what any country *should* do as a policy matter, although he is clear about what makes, as a general matter, an effective VAT regime. While a scholar could engage in tax policy research about other countries, concerns about the imperial tendencies of comparative tax law presumably ring bells of caution about

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44. *Id.* at 248.



over-extending scholarly work with this purpose in the absence of sufficient research and immersion.

### *C. Purpose 3: To Draw General Conclusions About Tax Law*

Another purpose of comparative law is to enable the scholar to draw some general conclusions about legal regimes, law, and law's structures.<sup>45</sup> This purpose is premised on the assumption that underlying tax

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45. See, e.g., Brian J. Arnold, *The Taxation of Investments in Passive Foreign Investment Funds in Australia, Canada, New Zealand and the United States*, in *ESSAYS ON INTERNATIONAL TAXATION* 5 (Herbert H. Alpert & Kees van Raad eds., 1993); HUGH J. AULT, *COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS* (1st ed. 1997); HUGH J. AULT & BRIAN J. ARNOLD, *COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS* (2d ed. 2004); HUGH J. AULT & BRIAN J. ARNOLD, *COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS* (3d ed. 2010); REUVEN S. AVI-YONAH ET AL., *GLOBAL PERSPECTIVES ON INCOME TAXATION LAW* (2011); 1–2 *A GLOBAL ANALYSIS OF TAX TREATY DISPUTES* (Eduardo Baistrocchi ed., 2017); *TAXPAYERS' RIGHTS: AN INTERNATIONAL PERSPECTIVE* (Duncan Bentley ed., 1998); Renate Buijze, *The Categorisation of Tax Jurisdictions in Comparative Tax Law Research*, 4 *ERASMUS L. REV.* 189 (2016); Luc De Broe, *The Relevance of Residence Under EC Tax Law*, in *RESIDENCE OF INDIVIDUALS UNDER TAX TREATIES AND EC LAW* 107 (Guglielmo Maisto ed., 2010); PIERRE DI MALTA, *DROIT FISCAL EUROPÉEN COMPARÉ* (1995); Klaus-Dieter Drüen & Daniel Drissen, *Burden of Proof and Anti-Abuse Provisions*, in *THE BURDEN OF PROOF IN TAX LAW* 27 (Gerard Meussen ed., 2013); Sandra Eden & Carlos Palao Taboado, *General Report on the Taxation of Workers in Europe*, in *TAXATION OF WORKERS IN EUROPE* 25 (Joerg Manfred Moessner ed., 2010); Craig Elliffe, *International Aspects of Capital Gains Taxation*, in *CAPITAL GAINS TAXATION: A COMPARATIVE ANALYSIS OF KEY ISSUES* 81 (Michael Littlewood & Craig Elliffe eds., 2017); Craig Elliffe, *International Tax Avoidance—The Tension Between Protecting the Tax Base and Certainty of Law*, 7 *J. BUS. L.* 647 (2011); *THE DELICATE BALANCE: TAX, DISCRETION AND THE RULE OF LAW* (Chris Evans et al. eds., 2011); Carlo Garbarino, *Comparative Taxation and Legal Theory: The Tax Design Case of the Transplant of General Anti-Avoidance Rules*, 11 *THEORETICAL INQUIRIES L.* 765 (2010); PETER HARRIS, *INCOME TAX IN COMMON LAW JURISDICTIONS: FROM THE ORIGINS TO 1820* (2006); PETER HARRIS & DAVID OLIVER, *INTERNATIONAL COMMERCIAL TAX* (2010); Walter Hellerstein, *Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective*, 38 *GA. L. REV.* 1 (2003); Susanne Kalss, *Corporate Group Law in Europe: The Status Quo Under Company and Commercial Law*, in *INTERNATIONAL AND*

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EC TAX ASPECTS OF GROUPS OF COMPANIES, *supra* note 40, at 3; Börje Leidhammar, *National Concepts*, in THE BURDEN OF PROOF IN TAX LAW, *supra*, at 19; Jinyan Li, *Tax Transplants and Local Culture: A Comparative Study of the Chinese and Canadian GAAR*, 11 THEORETICAL INQUIRIES L. 655 (2010); Michael Littlewood, *Capital Gains Taxes—A Comparative Survey*, in CAPITAL GAINS TAXATION: A COMPARATIVE ANALYSIS OF KEY ISSUES, *supra*, at 1; Giuseppe Marino, *The Burden of Proof in Cross-Border Situations (International Tax Law)*, in THE BURDEN OF PROOF IN TAX LAW, *supra*, at 39; INTERNATIONAL ASPECTS OF TAX EXPENDITURES: A COMPARATIVE STUDY (Paul R. McDaniel & Stanley S. Surrey eds., 1985); Gwyneth McGregor, *Tax Appeals: A Study of the Tax Appeal Systems of Canada, the United States and the United Kingdom* (Can. Tax Found., Can. Tax Paper No. 22, 1960); Gerard Meussen, *Burden of Proof and European Tax Law*, in THE BURDEN OF PROOF IN TAX LAW, *supra*, at 35; Joel S. Newman, *Taxation of Households: A Comparative Study*, 55 ST. LOUIS U. L.J. 129 (2010); Henry Ordower, *Restricting the Legislative Power to Tax: Intersections of Taxation and Constitutional Law*, 11 ELEC. J. COMPAR. L., Dec. 2007, at 1; John Prebble, *Trends in Anti-Avoidance Legislation*, APTIRC BULL., Feb. 1991, at 57 (1991); ALAN SCHENK et al., VALUE ADDED TAX: A COMPARATIVE APPROACH (2d ed. 2015) (for a review, see Pierre-Pascal Gendron, *Value Added Tax: A Comparative Approach, Second Edition*, 69 NAT'L TAX J. 241 (2016)); ALAN SCHENK & OLIVER OLDMAN, VALUE ADDED TAX: A COMPARATIVE APPROACH (2007) (for a review, see David Duff et al., *Current Tax Reading*, 50 CAN. TAX J. 802, 804 (2002)); Wolfgang Schön, *Tax Competition in Europe—General Report*, in TAX COMPETITION IN EUROPE 1 (Wolfgang Schön ed., 2003); Roman Seer & Anna Lena Wilms, *General Report*, in SURCHARGES AND PENALTIES IN TAX LAW, *supra* note 40, at 3; Paul B. Stephan, *Comparative Taxation Procedure and Tax Enforcement*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 599 (Stephan W. Schill ed., 2010); Zhicheng Li Swift et al., *Tax Expenditures: General Concept, Measurement, and Overview of Country Practices*, in TAX EXPENDITURES—SHEDDING LIGHT ON GOVERNMENT SPENDING THROUGH THE TAX SYSTEM: LESSONS FROM DEVELOPED AND TRANSITIONAL ECONOMIES 1 (Hana Polackova Brixi et al. eds., 2004); 1 TAX LAW DESIGN AND DRAFTING (Victor Thuronyi ed., 1996); 2 TAX LAW DESIGN AND DRAFTING (Victor Thuronyi ed., 1998); John Tiley, *Judicial Anti-Avoidance Doctrines: Corporations and Conclusions*, 1988 BRIT. TAX REV. 108; John Tiley, *Judicial Anti-Avoidance Doctrines: Some Problem Areas*, 1988 BRIT. TAX REV. 63; VAT AND FINANCIAL SERVICES: COMPARATIVE LAW AND ECONOMIC PERSPECTIVES (Robert F. van Brederode & Richard Krever eds., 2017); Klaus Vogel, *The Domestic Law Perspective*, in TAX TREATIES AND DOMESTIC LAW 3 (Guglielmo Maisto ed., 2006); L. HART WRIGHT ET AL., COMPARATIVE CONFLICT RESOLUTION PROCEDURES IN TAXATION: AN ANALYTIC COMPARATIVE STUDY (1968).



law is a deep structure—a set of fundamental policy decisions that, when determined, become the basic (and common) building blocks of the particular legal regime. Comparative law is useful in achieving this purpose because in the absence of understanding a good deal about a number of systems, the deep structure would be difficult to discern.

Peter Harris, professor of tax law at the University of Cambridge, has authored a book, *Corporate Tax Law: Structure, Policy and Practice*, which is a fine illustration of work that uses comparison to draw general conclusions about legal regimes and law.<sup>46</sup> As Harris claims, the book “seeks to provide a conceptual framework, a structure within which to analyse and illustrate the many difficult issues posed by corporations for income taxation.”<sup>47</sup> His position is decidedly that corporate tax has an identified structure, regardless of the jurisdiction in which it is implemented.<sup>48</sup> The design of the book reflects each of the major structural policy decisions necessary for the drafting, design, and implementation of a corporate tax—from what is a corporation, to dividend relief options, to the consequences of varying share interests.

In order to build a structural outline of corporate tax systems, Harris draws on his knowledge of multiple jurisdictions, much of which was likely developed because of his role as a technical expert within the IMF’s legal department. Harris’s claim is that breadth of country knowledge was necessary for him to discern the “major issues faced by and options available for a corporate tax system.”<sup>49</sup>

While Harris’s assessment of the deep structure of corporate tax systems was generated from his vast knowledge of many countries’ corporate tax system, the book refers only to a subset of those countries: the European Union, Germany, United Kingdom, and United States.<sup>50</sup> Those countries were chosen because they capture aspects across common law, civil law, and federal states, and they reflect a wide scope of influence (in the sense that many other countries borrow design features from these four). They align with Victor Thuronyi’s country

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46. PETER HARRIS, *CORPORATE TAX LAW: STRUCTURE, POLICY AND PRACTICE* (2013).

47. *Id.* at 1.

48. Harris boldly claims, “[t]he structure offered by this book is generic and may be used to analyse the corporate tax system of any country.” *Id.*

49. *Id.*

50. *Id.* at 1–2.

selection recommendation.<sup>51</sup> Understanding the structure of a reasonable number of countries is necessary for a scholar to approach this kind of topic. Without knowledge of the design of tax law in multiple jurisdictions, it would be difficult to discern the law's essential features. Harris is able to undertake this work in part because of his familiarity with tax law design in many jurisdictions, even if he limits his discussion of laws of particular countries to a smaller subset of those jurisdictions.

*Corporate Tax Law* is a model of scholarship with this purpose in part because it advances understanding of corporate tax policy and systems. Readers of the book will be well positioned to approach and interpret the corporate tax law of any country. Harris is able to step away from a description of the laws of each jurisdiction in a rote fashion. Instead, he organizes the book around an explanation of the purpose of the various policy options available in the taxation of corporations, offers some brief observations about why some options are preferred in particular contexts, and focuses on the fundamental structural aspects of the corporate tax without overwhelming the reader in detail.

There are limits to Harris's work that are a function of the identified purpose. While the articulated purpose does not require scholars to limit their work to legislation, as a practical matter, most do. Work in this category generally ignores jurisprudence, administrative practice, academic contributions, and tax institutions and actors presumably because the scope of the work is already so substantial that expanding the materials explored would make the project unsustainable. More fundamentally, if the purpose of a scholarly project is to delineate the fundamental framework of a particular tax law, the project of necessity does not grapple with the broader context, nor does it contemplate whether

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51. One of Victor Thuronyi's novel additions to the comparative tax literature is the development of legal families for the purposes of comparative tax scholarship. In his 2003 book, he classifies countries into 10 families in a rough and ready way, accepting that some countries may belong to a few families. His claim is that the countries within each family have a common tax law skeleton, which should make it possible to predict with some accuracy the tax law design of other countries in the same family once one has familiarity with one of the countries in the family. Even more dramatically, Thuronyi claims that scholars with insufficient time to explore the richer array of families could learn most of what there is to learn from tax law design by studying Germany, the United Kingdom, and the United States. VICTOR THURONYI, *COMPARATIVE TAX LAW* 9–10 (2003).

there are alternative designs that would be desirable and, in the main, the work shies away from addressing the larger political and distributional questions that might be raised in relation to the imposition of corporate taxes.

Finally, Harris's book does not include lower-income countries as comparators. This is a missed opportunity given Harris's expertise. Those legal regimes are often simpler in design, and it is arguable that a structural review of a system is missing something if it fails to account for which aspects of the legal framework might be omitted or simplified, and in what circumstances, without losing much of the overall design.

### III. NORMATIVE COMPARATIVE TAX SCHOLARSHIP

Unlike scholarship in the descriptive vein, scholarship in this category has a decidedly normative bent. The scholars who undertake this work have as central to their purpose to improve tax law, whether at a domestic or global level. Undertaking this kind of scholarship requires identifying what makes some laws "better" than others. The stronger scholarship in this category is explicit about the criteria being applied to assess tax laws and the evidence that underpins why some laws should be changed (and to what). The advantage of comparative scholarship of this type is that the world provides a ready source of other laws that can be borrowed and countries whose experiences offer up natural experiments. The risk, of course, is that inadequate study of approaches and context in other jurisdictions may lead to hasty and ill-conceived recommendations for reform. The press to find good (or at least workable) tax solutions in some countries may also lead scholars to recommend reforms in line with "best practices" when best practice may simply be a proxy for common practice. Some of this scholarship looks toward global harmonization and coordination as a good independent of the rules themselves and, as a result, scholars may inadvertently find themselves arguing for the adoption of mediocre solutions, ill fitted to the circumstances of many countries.

#### *A. Purpose 4: To Press for or Support Legal Change*

Less grand in its aspirations than work that attempts to postulate a universal model or to argue in favour of broad-based coordination or harmonization is comparative tax law scholarship that reviews approaches

in other jurisdictions to look for “best practice” (or workable) solutions to shared tax problems.<sup>52</sup> This kind of work dominates the comparative

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52. For work that has this as a primary purpose, see, for example, Benjamin Alarie & Matthew Sudak, *The Taxation of Strike Pay*, 54 CAN. TAX J. 426 (2006); Brian Arnold, *A Comparison of Statutory General Anti-Avoidance Rules and Judicial General Anti-Avoidance Doctrines as a Means of Controlling Tax Avoidance: Which Is Better? (What Would John Tiley Think?)*, in COMPARATIVE PERSPECTIVES ON REVENUE LAW: ESSAYS IN HONOUR OF JOHN TILEY 1 (John Avery Jones et al. eds., 2008); BRIAN J. ARNOLD, *THE TAXATION OF CONTROLLED FOREIGN CORPORATIONS: AN INTERNATIONAL COMPARISON* (1986); Reuven S. Avi-Yonah, *A Perspective of Supra-Nationality in Tax Law*, in BRICS AND THE EMERGENCE OF INTERNATIONAL TAX COORDINATION, *supra* note 40, at 33; Reuven S. Avi-Yonah, *The Treatment of Corporate Preference Items Under an Integrated Tax System: A Comparative Analysis*, 44 TAX LAW. 195 (1990); Frédéric Bachand, *Restitution of Unlawfully Levied Taxes: Survey and Comparative Analysis of Developments in Canada, Australia, and England*, 38 ALTA. L. REV. 960 (2001); William B. Barker, *The Disconnect Between Tax Concepts and the World of Fact: State Law as the Gatekeeper*, 57 WASHBURN L.J. 129 (2018); Ian F.G. Baxter, *The United Kingdom and Tax Havens: A Comparative Comment*, 33 AM. J. COMPAR. L. 707 (1985); Richard M. Bird & Eric M. Zolt, *Taxation and Inequality in Canada and the United States: Two Stories or One?*, 52 OSGOODE HALL L.J. 401 (2015); Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971); Mark Bowler-Smith, *Comparing R&D Tax Regimes: Australia, Canada, UK and US*, 2017 BRIT. TAX REV. 34; Kim Brooks, *Tax Treaty Treatment of Royalty Payments from Low-Income Countries: A Comparison of Canada and Australia's Policies*, 5 EJOURNAL TAX RSCH. 169 (2007); Catherine A. Brown, *Taxation and the Cross-Border Trade in Services: Rethinking Non-Discrimination Obligations*, 21 FLA. TAX REV. 715 (2018); Catherine Brown & Christine Manolakas, *Tax Discrimination and the Trade in Services Between Canada and the United States: Deciphering the Landscape*, in TAXATION AND VALUATION OF TECHNOLOGY: THEORY, PRACTICE, AND THE LAW 179 (James L. Horvath & David W. Chodikoff eds., 2008); Tamer Budak & Simon James, *The Level of Tax Complexity: A Comparative Analysis Between the U.K. and Turkey Based on the OTS Index*, 44 INT'L TAX J. 23 (2018); ANDREAS BULLEN, *ARM'S LENGTH TRANSACTION STRUCTURES: RECOGNIZING AND RESTRUCTURING CONTROLLED TRANSACTIONS IN TRANSFER PRICING* (2011); Wei Cui, *Taxing Indirect Transfers: Rules and Doctrines*, in TAXATION OF COMPANIES ON CAPITAL GAINS ON SHARES UNDER DOMESTIC LAW, EU LAW AND TAX TREATIES, *supra* note 40, at 259; Rita de la Feria & Michael Walpole, *Options for Taxing Financial Supplies in Value Added Tax: EU VAT and Australian GST Models Compared*, 58 INT'L

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& COMPAR. L.Q. 897 (2009); Thomas Dubut, *Designing Anti-Base-Erosion Rules for Developing Countries: Challenges and Solutions*, in TAX DESIGN ISSUES WORLDWIDE, *supra* note 40, at 141; David G. Duff, *Responses to Tax Treaty Shopping: A Comparative Evaluation*, in TAX TREATIES: BUILDING BRIDGES BETWEEN LAW AND ECONOMICS 75 (Michael Lang et al. eds., 2010); Gerald Dworkin, *Damages and Tax—A Comparative Survey—I*, 1967 BRIT. TAX REV. 315; Gerald Dworkin, *Damages and Tax—A Comparative Survey—II*, 1967 BRIT. TAX REV. 373; Karina Kim Egholm Elgaard, *A Comparative Analysis of VAT Grouping Schemes from a Nordic Perspective—Aspects of Tax Avoidance and Fiscal Competition*, 2017 NORDIC TAX J. 1 (2017); Chris Evans & Richard Krever, *Taxing Capital Gains: A Comparative Analysis and Lessons for New Zealand*, 23 N.Z. J. TAX’N L. & POL’Y 486 (2017); Lilian V. Faulhaber, *Charitable Giving, Tax Expenditures, and Direct Spending in the United States and the European Union*, 39 YALE J. INT’L L. 87 (2014); Keith Fogg & Sime Jozipovic, *How Can Tax Collection Be Structured to Observe and Preserve Taxpayer Rights: A Discussion of Practices and Possibilities*, 69 TAX LAW. 513 (2016); Stjepan Gadžo & Irena Klemenčić, *Time to Stop Avoiding the Tax Avoidance Issue in Croatia? A Proposal Based on Recent Developments in the European Union*, 38 FIN. THEORY & PRAC. 277 (2014); Michael J. Graetz & Alvin C. Warren, Jr., *Income Tax Discrimination and the Political and Economic Integration of Europe*, 115 YALE L.J. 1186 (2006); CHRISTOPHER H. HANNA, *COMPARATIVE INCOME TAX DEFERRAL: THE UNITED STATES AND JAPAN* (2000); Johannes Heinrich, *Tax Neutrality Between CIT and Non-CIT Subjects: How to Improve Our Systems?*, in CORPORATE INCOME TAX SUBJECTS, *supra* note 40, at 133; Sigrid Hemels, *Tax Incentives for Museums and Cultural Heritage*, in TAX INCENTIVES FOR THE CREATIVE INDUSTRIES, *supra* note 40, at 107; Asrul Hidayat, *A Comparative Analysis of Corporate Tax Group Regime in Australia, Germany, and Indonesia*, 1 SIMPOSIUM NASIONAL KEUANGAN NEGARA 1209 (2018); Hu Tianlong, *An Egg vs. an Orange: A Comparative Study of Tax Treatments of Nonprofit Organizations*, 10 FRONTIERS L. CHINA 161 (2015); Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605; Anthony C. Infanti, *Spontaneous Tax Coordination: On Adopting a Comparative Approach to Reforming the U.S. International Tax Regime*, 35 VAND. J. TRANSNAT’L L. 1105 (2002); Tracy A. Kaye, *Tax Discrimination: A Comparative Analysis of US and EU Approaches*, in COMPARATIVE FISCAL FEDERALISM: COMPARING THE EUROPEAN COURT OF JUSTICE AND THE US SUPREME COURT’S TAX JURISPRUDENCE 191 (Reuven S. Avi-Yonah et al. eds., 2007); Jeffrey S. Kinsler, *A Comparative Proposal to Reform the United States Gift Tax Annual Exclusion*, 30 VAND. J. TRANSNAT’L L. 949 (1997); Blazej Kuzniacki, *Controlled Foreign Companies and Tax Avoidance: International and Comparative Perspectives with Specific Reference to Polish Tax and Constitutional Law, EU Law and Tax Treaties* (2018), <https://papers.ssrn.com>

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/sol3/papers.cfm?abstract\_id=3107382 [https://perma.cc/WL57-4CL3]; ANTTI LAUKKANEN, TAXATION OF INVESTMENT DERIVATIVES (2007); Charles Edward Andrew Lincoln IV, *Are International Tax Treaties Compatible with Controlled Foreign Corporation (CFC) Rules? A Technical and a Political History Approach for a Normative Result* (2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3212253](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3212253) [https://perma.cc/3GB3-LEFT]; Lawrence Lokken & Yoshimi Kitamura, *Credit vs. Exemption: A Comparative Study of Double Tax Relief in the United States and Japan*, 30 NW. J. INT'L L. & BUS. 621 (2010); Omri Y. Marian, *Meaningless Comparisons: Corporate Tax Reform Discourse in the United States*, 32 VA. TAX REV. 133 (2012); Ruth Mason, *Common Markets, Common Tax Problems*, 8 FLA. TAX REV. 599 (2007); Ruth Mason, *Made in America for European Tax: The Internal Consistency Test*, 49 B.C. L. REV. 1277 (2008); Emmanuel Mathias & Gianluca Esposito, *Using Anti-Money Laundering Measures to Improve Tax Compliance*, in TAX DESIGN ISSUES WORLDWIDE, *supra* note 40, at 277; STEFAN MAYER, FORMULARY APPORTIONMENT FOR THE INTERNAL MARKET (2009); Martin J. McMahon, Jr., *Comparing the Application of Judicial Interpretive Doctrines to Revenue Statutes on Opposite Sides of the Pond*, in COMPARATIVE PERSPECTIVES ON REVENUE LAW, *supra*, at 40; Stephanie Hunter McMahon, *London Calling: Does the U.K.'s Experience with Individual Taxation Clash with the U.S.'s Expectations*, 55 ST. LOUIS U. L.J. 159 (2010); Geerten M.M. Michiels et al., *Allowances for Corporate Equity*, in TAX DESIGN ISSUES WORLDWIDE, *supra* note 40, at 121; Rebecca Millar, *Smoke and Mirrors: Applying the Full Taxation Model to Government Under the Australian and New Zealand GST Laws*, in VAT EXEMPTIONS: CONSEQUENCES AND DESIGN ALTERNATIVES, at ch. 4 (Rita de la Feria ed., 2013); Rebecca Millar, *VAT and Immovable Property: Full Taxation Models and the Treatment of Capital Gains on Owner-Occupied Residences*, in VAT EXEMPTIONS, *supra*, at ch. 8; Rebecca Mitchell, *Comparative Standards of Legal Advice Privilege for Tax Advisers and Optimal Reform Proposals for English Law*, 19 INT'L J. EVIDENCE & PROOF 246 (2015); Dick Molenaar, *Tax Incentives for Artists*, in TAX INCENTIVES FOR THE CREATIVE INDUSTRIES, *supra* note 40, at 211; Irma Mosquera Valderrama et al., *Tools Used by Countries to Counteract Aggressive Tax Planning in Light of Transparency*, 46 INTERTAX 140 (2018); Martha O'Brien, *Corporate Group Taxation: The Slow Lane to New Policies in Canada and the EU* (2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2298150](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298150) [https://perma.cc/9ZWM-6BMA]; Annet Wanyana Oguttu, *Curb-ing Income Tax Avoidance that Results from Cross-Border Leasing: A Comparative Overview with Specific Reference to South Africa*, 26 S. AFR. MERCANTILE L.J. 338 (2014); Oliver Oldman & Ralph Temple, *Comparative Analysis of the Taxation of Married Persons*, 12 STAN. L. REV. 585 (1960); Florea Oprea, *The Legal Nature of Over-Taxation or Surcharging*, 10 UNION JURISTS ROM. L. REV. 1 (2012); James Otto, *Comparative International Tax Regimes*, 50



tax law scholarship, perhaps in part because it can be undertaken with the least amount of comparative depth. Undertaking to explain the underlying structure of a particular tax (or aspect of tax) (purpose 3) requires a detailed knowledge of the tax laws of many countries, as does

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ROCKY MTN. MIN. L. INST. 17-1 (2004); Eda Özdiler Küçük, *General Rule of Burden of Proof: Comparative Analysis of Turkish and German Tax Law*, 7 HACETTEPE HUKUK FAKÜLTESİ DERGİSİ 105 (2017); Christine Peacock, *Is There a Viable Way to Tax the Consumption of Immovable Property that Is More Consistent with the Economic Objective of the VAT?*, 13 J. AUSTRALASIAN TAX TCHRS. ASS'N 336 (2018); Bruno Peeters & Patricia Popelier, *Retroactive Interpretive Statutes and Validation Statutes in Tax Law: An Assessment in the Light of Legal Certainty, Separation of Powers, and the Right to a Fair Trial*, in RETROACTIVITY OF TAX LEGISLATION, *supra* note 40, at 117; Dale Pinto & Stewart Karlinsky, *Darwinian Evolution of the Taxation of Trusts: A Comparative Analysis*, 10 J. AUSTL. TAX'N 251 (2007); John Prebble, *Canadian and Swedish Procedures for Advance Rulings in Income Tax Cases*, 4 AUSTL. TAX F. 217 (1987); Alexander Rust, *The Concept of Residence in Inheritance Tax Law*, in RESIDENCE OF INDIVIDUALS UNDER TAX TREATIES AND EC LAW, *supra* note 45, at 85; Emily Ann Satterthwaite, *On the Threshold: Smallness and the Value-Added Tax*, 9 COLUM. J. TAX L. 177 (2018); Nancy Shurtz, *Sweden, Singapore, and the States: A Comparative Analysis of the Impact of Taxation on the Welfare of Working Mothers*, 55 ST. LOUIS U. L.J. 1087 (2011); Ruud Sommerhalder, *The Taxation of Families and Individuals in Europe*, in TAX UNITS AND THE TAX RATE SCALE 163 (John Head & Richard Krever eds., 1996); Al Stander et al., *Real Estate Tax in South Africa: A Comparative Study with Particular Reference to Germany*, 1998 J. S. AFR. L. 450 (1998); Oleg Stratiev, *Cryptocurrency and Blockchain: How to Regulate Something We Do Not Understand*, 33 BANKING & FIN. L. REV. 173 (2018); William T. Thistle, *A Comparative Guide of Where to Die: Should the United Kingdom Repeal Its Inheritance Tax?*, 36 GA. J. INT'L & COMPAR. L. 705 (2008); Jurian van der Pas, *Improving the Chinese General Anti-Avoidance Rule: A Comparative and Functional Approach*, 8 WORLD TAX J. 79 (2016); Dietrich von Boetticher, *A New Approach to Taxation of Investments in Less Developed Countries: A Comparison of Tax Laws in the United States and in West Germany*, 17 AM. J. COMPAR. L. 529 (1969); Andy Wardhana, *Legislative Reform Proposals to Address Aggressive Transfer Pricing: A Comparative Study of Indonesia and China* (2018), <https://www.business.unsw.edu.au/About-Site/Schools-Site/Taxation-Business-Law-Site/Documents/45-Wardhana-ATTA2018.pdf> [https://perma.cc/GGK9-JLHJ], (paper presented to the ATTA Conference 2018, Monash University); Malte Wilke & Alisdair MacPherson, *Liability of Banks for Aiding Tax Evasion: A Comparative Analysis of German and UK Law*, 10 EUR. J. RISK REGUL. 148 (2019).

developing a model for wide application (purpose 5). Scholars who use comparative experience to press for or support legal change in their home jurisdictions often believe that they can sufficiently support their case with a relatively superficial understanding of part of one other jurisdiction's tax laws. The claim of this work may not necessarily even be that that law works well in the other jurisdiction—only that if imported it would work well in the home jurisdiction. At its best, scholarship in this category seeks to “battle[] with parochialism” and to push the scholar's host country to look beyond its own borders for expertise.<sup>53</sup>

Brian Arnold, an emeritus law professor at Western University in Canada, has undertaken much comparative study, and his work does not suffer from the dilettantism that can be the flaw of at least some of the work that uses comparative study to achieve legal reform. In *The Process of Tax Policy Formulation in Australia, Canada and New Zealand*, Arnold examines how tax policy is developed in the three comparator countries—all countries he knows well and in which he has spent substantial time.<sup>54</sup>

As an aside, the focus of Arnold's work distinguishes it from much other comparative tax work, which looks to legislation as the main object of comparison. In this piece, Arnold looks at tax policy formulation, which he explains, “involves the preparation of public discussion papers or consultative documents and the consideration of public submissions; and it cumulates with the drafting of the legislation.”<sup>55</sup> Arnold adds to the literature by characterizing tax policy formulation into three parts: policy development, technical analysis, and statutory drafting.<sup>56</sup> He looks separately at the tax policy formulation process in each country and then draws some general conclusions. His comparative work allows him to conclude that if these three functions are not all undertaken within the same part of a government bureaucracy, they will be less efficient and effective than they should be.<sup>57</sup>

Arnold is careful to circumscribe his conclusions:

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53. See Riles, *supra* note 15, at 12.

54. Brian J. Arnold, *The Process of Tax Policy Formulation in Australia, Canada and New Zealand*, 7 AUSTL. TAX F. 379 (1990).

55. *Id.* at 380–81.

56. *Id.* at 382.

57. *Id.*



It must be emphasised that the views expressed in this article are necessarily general and tentative. They reflect the author's personal experience as a consultant to the governments of the three countries rather than the results of any academic research. As a result, the analysis in the article may not disclose subsidiary aspects of the tax policy process that may affect the extent to which the process is integrated. . . . My sole purpose in writing the article is to contribute to the debate concerning the process of tax policy formulation in the three countries in the hope that the process can be improved.<sup>58</sup>

Expressly limiting the conclusions of the study to tax policy formulation in the three countries surveyed, and not attempting to expand those conclusions beyond those borders, is one of the strengths of Arnold's scholarship. He does not "over-claim." Ultimately, his major contribution is the recognition that tax policy formulation is an integrated process—involving policy development, technical analysis, and statutory drafting. His ability to evaluate how each jurisdiction fares through those processes, and to recommend adjustments to the process that might yield improvements, makes this article a good illustration of this kind of scholarship.

*B. Purpose 5: To Search for a Common Legal Future (and to Harmonize or Coordinate)*

Projects where the scholar undertakes comparative work to search for a common legal future share a set of beliefs about law with projects that draw general conclusions about law and its design (purpose 3): scholars who engage in this kind of work generally believe that tax law has a "common core" that can be discerned through sufficient study of specific examples.<sup>59</sup> What differentiates the work, however, in its strongest

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58. *Id.* at 381.

59. For examples of work within this category, see, for example, Richard T. Ainsworth, *Global Changes in Regulating Corporate Auditors: A Comparative Assessment*, 36 TAX NOTES INT'L 1029 (Dec. 20, 2004) (discussing EU, U.K., French, U.S., Australian and Japanese responses to auditor independence); Benjamin Alarie et al., *Advance Tax Rulings in Perspective:*

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*A Theoretical and Comparative Analysis*, 20 N.Z. J. TAX L. & POL'Y 362 (2014); Christine Alves Alvarrenga, *Preventing Tax Avoidance: Is There Convergence in the Way Countries Counter Tax Avoidance?*, 67 BULL. FOR INT'L TAX'N 348 (July 2013); Fabrizio Amatucci & Giuseppe Zizzo, *Income Tax Status of Non-Profit Organizations: Formal Requirements and Business Activities*, in TAXATION OF CHARITIES, *supra* note 40, at 45; Eduardo Baistrocchi, *Transfer Pricing Dispute Resolution: The Global Evolutionary Path (1799–2011)*, in RESOLVING TRANSFER PRICING DISPUTES: A GLOBAL ANALYSIS 835 (Eduardo Baistrocchi & Ian Roxan eds., 2012); Yariv Brauner & Pasquale Pistone, *The BRICS and the Future of International Taxation*, in BRICS AND THE EMERGENCE OF INTERNATIONAL TAX COORDINATION, *supra* note 40, at 495; Neil Brooks & Thaddeus Hwong, *Tax Levels, Structures, and Reforms: Convergence or Persistence*, 11 THEORETICAL INQUIRIES L. 791 (2010); Jan J.P. de Goede, *The BRICS Countries in the Context of the Work on the UN Model*, in BRICS AND THE EMERGENCE OF INTERNATIONAL TAX COORDINATION, *supra* note 40, at 421; Lorenzo Del Federico & Francesco Montanari, *Decriminalization of Tax Law by Administrative Penalties on Tax Duties*, in SURCHARGES AND PENALTIES IN TAX LAW, *supra* note 40, at 101; Michael Dewar, *Global Convergence of Tax Judgements and Principles Between South African Courts and Foreign Courts: Assessing Evidence of Convergence in South African Case Law and Its Desirability in a South African Context* (Feb. 2018), <http://hdl.handle.net/11427/29571> [<https://perma.cc/ZC55-Y2Y2>] (Master's thesis, University of Cape Town); ALEX EASSON, TAX INCENTIVES FOR FOREIGN DIRECT INVESTMENT (2004); TIM EDGAR, THE INCOME TAX TREATMENT OF FINANCIAL INSTRUMENTS: THEORY AND PRACTICE (2000); THE DETERMINATION OF CORPORATE TAXABLE INCOME IN THE EU MEMBER STATES (Dieter Endres et al. eds., 2006); Augusto Fantozzi, *Conclusions*, in MULTILINGUAL TEXTS AND INTERPRETATION OF TAX TREATIES AND EC TAX LAW, *supra* note 40, at 335; CARLO GARBARINO, JUDICIAL INTERPRETATION OF TAX TREATIES: THE USE OF THE OECD COMMENTARY (2016); Carlo Garbarino, *Tax Transplants and Circulation of Corporate Tax Models*, 2011 BRIT. TAX REV. 159; Daniel Gutmann, *Taxation of Immovable Property from a Civil Law Perspective*, in IMMOVABLE PROPERTY UNDER DOMESTIC LAW, EU LAW AND TAX TREATIES, *supra* note 40, at 3; PETER ANDREW HARRIS, CORPORATE/SKAREHOLDER INCOME TAXATION AND ALLOCATING TAXING RIGHTS BETWEEN COUNTRIES: A COMPARISON OF IMPUTATION SYSTEMS (1996); Kathryn James, *An Examination of Convergence and Resistance in Global Tax Reform Trends*, 11 THEORETICAL INQUIRIES L. 475 (2010); Eleonor Kristofferfsson, *Comparative Studies of National Law in the EU Harmonized VAT*, 1 NORDIC TAX J. 29 (2016); JINYAN LI, INTERNATIONAL TAXATION IN THE AGE OF ELECTRONIC COMMERCE: A COMPARATIVE STUDY (2003); Michael A. Livingston, *Law, Culture, and Anthropology: On the Hopes and Limits of Comparative Tax*, 18 CAN. J.L. & JURIS. 119 (2005); Michael A. Livingston, *From Milan to*

form, is that scholars who search for a common legal future tend to, as a normative matter, think that legal regimes would be improved if countries moved toward greater similarity—either through harmonization

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*Mumbai, Changing in Tel Aviv: Reflections on Progressive Taxation and “Progressive” Politics in a Globalized but Still Local World*, 54 AM. J. COMPAR. L. 555 (2006); Ern Chen Loo et al., *An International Comparative Analysis of Self Assessment: What Lessons Are There for Tax Administrators?*, 20 AUSTL. TAX F. 669 (2005); Ruben Martini & Ekkehart Reimer, *Corporate Income Tax Subjects and EU Harmonization*, in CORPORATE INCOME TAX SUBJECTS, *supra* note 40, at 157; Gwyneth McGregor, *Employees’ Deductions Under the Income Tax: A Comparative Study of Their Treatment in the United Kingdom, the United States and Canada* (Can. Tax Found., Can. Tax Paper No. 21, 1960); Gwyneth McGregor, *Personal Exemptions and Deductions Under the Income Tax, with Special Reference to Canada, the U.S. and the U.K.* (Can. Tax Found., Can. Tax Paper No. 31, 1962); MICHAEL J. MCINTYRE & OLIVER OLDMAN, INSTITUTIONALIZING THE PROCESS OF TAX REFORM: A COMPARATIVE ANALYSIS (1975); DICK MOLENAAR, TAXATION OF INTERNATIONAL PERFORMING ARTISTES: THE PROBLEMS WITH ARTICLE 17 OECD AND HOW TO CORRECT THEM (2005); Susan C. Morse & Robert Deutsch, *Tax Anti-Avoidance Law in Australia and the United States*, 49 INT’L LAW. 111 (2015); Nabil Orow, *Comparative Approaches to the Interpretation of Double Tax Conventions*, 26 ADELAIDE L. REV. 73 (2005); FRANK PÖTGENS, INCOME FROM INTERNATIONAL PRIVATE EMPLOYMENT: AN ANALYSIS OF ARTICLE 15 OF THE OECD MODEL (2006); PERNILLA RENDAHL, CROSS-BORDER CONSUMPTION TAXATION OF DIGITAL SUPPLIES (2009); CARLO ROMANO, ADVANCE TAX RULINGS AND PRINCIPLES OF LAW: TOWARDS A EUROPEAN TAX RULINGS SYSTEM? (2002); DANIEL SANDLER, VENTURE CAPITAL AND TAX INCENTIVES: A COMPARATIVE STUDY OF CANADA AND THE UNITED STATES (2004); Wolfgang Schön et al., *Debt and Equity in Domestic and International Tax Law—A Comparative Policy Analysis*, 2014 BRIT. TAX REV. 146; John A. Swain, *Same Questions, Different Answers: A Comparative Look at International and State and Local Taxation*, 50 ARIZ. L. REV. 111 (2008); Afton Titus, *Designing a General Anti-Avoidance Rule for the East African Community—A Comparative Analysis*, 11 WORLD TAX J. 261 (2019); Richard Vann, *Current Trends in Balancing Residence and Source Taxation*, in BRICS AND THE EMERGENCE OF INTERNATIONAL TAX COORDINATION, *supra* note 40, at 367; Irma Johanna Mosquera Valderrama et al., *The Rule of Law and the Effective Protection of Taxpayers’ Rights in Developing Countries* (WU Int’l Tax’n Rsch. Paper Series No. 2017-10, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3034360](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3034360) [<https://perma.cc/9QJC-24Z8>]; Rainer Zielke, *Taxation of Capital Gains in the European Union, Norway, and Switzerland: An Empirical Survey with Recommendations for EU Harmonization and International Tax Planning*, 37 INTERTAX 382 (2009).

or coordination. They also tend to believe that some policy decisions are better than others.<sup>60</sup> In its weaker form, scholars who pursue work with this purpose believe there is progression toward a harmonized or coordinated future, although they may not believe that trajectory is desirable as a normative matter.

Antony Ting, a professor at the University of Sydney's business school, has published a detailed comparative study of the consolidation regimes of eight countries.<sup>61</sup> One of the strengths of Ting's work is his explicit consideration of the objectives of his comparative study. He uses Australia, France, Italy, Japan, the Netherlands, New Zealand, Spain, and the United States because each had introduced a consolidation regime by 2009. *The Taxation of Corporate Groups Under Consolidation: An International Comparison* identifies ten key structural elements of consolidation regimes: the degree to which the tax system treats the group as a single entity, how a consolidated group computes its taxable income, who is responsible for the tax liability of the consolidated group, whether the election to consolidate is revocable, whether the companies for consolidation can be selected by the taxpayer, or whether the reporting of all subsidiaries is mandatory (the "all in" rule), the definition of a group, and the treatment of pre-consolidation losses, the consolidated group's losses, assets, and intra-group shares.

Ting is explicit about his "intention of searching for a model regime."<sup>62</sup> To that end, it models the purpose of three projects (which use comparative law to reveal a general design), and it takes that purpose farther by recommending an ideal model (that presumably all systems should aspire toward).<sup>63</sup> This model is justified on the grounds that, "it is important for countries that contemplate the introduction of a consolidation regime to get the legislation right when it is first introduced."<sup>64</sup>

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60. One of the most diligent advocates for this approach to comparative tax law is Carlo Garbarino. *See, e.g.,* Carlo Garbarino, *An Evolutionary Approach to Comparative Taxation: Methods and Agenda for Research*, 57 AM. J. COMPAR. L. 677 (2009).

61. ANTONY TING, *THE TAXATION OF CORPORATE GROUPS UNDER CONSOLIDATION: AN INTERNATIONAL COMPARISON* (2013).

62. *Id.* at xiii.

63. Ting clearly identifies his two objectives as to "identif[y] the key structural elements" and to "search for a model consolidation regime, representing the best practice in respect of the key structural elements on policy grounds." *Id.* at 8.

64. *Id.*

Ting's view that some policy choices are better than others serves as a central motivating feature of his work. Each of the chapters in Part 2 of the book describes how the eight different countries resolve the ten policy judgements (described as structural elements) in their consolidation regime design. The articulation of an ideal model is reserved for the final chapter (chapter 10) of the book.

In addition to evaluating the best policy options in the design of consolidation regimes, Ting answers an additional question: "does a stronger application of the enterprise doctrine necessarily imply a better consolidation regime on policy grounds?"<sup>65</sup> In other words, he explores whether a design feature of a corporate system (the degree to which a nation views the corporation as a single and discrete entity versus as an enterprise that is consolidated on the grounds of control and economic integration) might result in (or has consequences for) the design of a better consolidation regime. Ting devotes the first part of his book to explaining why the enterprise doctrine offers a more appropriate lens from which to develop tax policy. He uses that analysis to explain the subsequent decisions countries make in designing consolidate regimes, testing the hypothesis that when a country adheres to the enterprise doctrine it is more likely to adopt better tax policy. Ultimately, however, Ting concludes that a stronger enterprise doctrine does not necessarily lead to a better consolidation regime.<sup>66</sup> That is in part based on Ting's view that a strong enterprise doctrine can introduce unnecessary complexity.

Projects with this purpose have inspired other scholars to critique comparative law scholarship for its colonial and imperial intentions or effects. At its most extreme, that criticism has led to an effort to discredit all comparative work with this purpose. Ting acknowledges the risks of ignoring the local circumstances with a brief caution.<sup>67</sup> His work illustrates some of the limits of work with this kind of scale by a sole author. It does not engage in any detailed way with the local context of the countries he compares, and he offers no analysis of which

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65. *Id.* at 9.

66. *Id.* at 293.

67. *Id.* at 8–9 ("Transplanting a policy solution from one country to another without due consideration of the local circumstances and constraints can be hazardous, as the policy solution in a country may be the compromise between conflicting policy objectives and political forces particular to that country.").

local conditions would affect aspects of his proposed model. Ting is not an insider to many of the countries he chooses as comparators. The primary research source for the work is legislation; there are minimal references to administrative policy or case law and seemingly no (or limited) engagement with tax actors in the jurisdictions being studied. Ting's project is nevertheless valuable because it addresses an important lacuna: all countries with corporate tax systems confront the issue of how to design loss relief. Developing legislative responses "from scratch" is time consuming. Learning from the successes and challenges of others with similar problems can be efficient, even if there are risks to legal transplants and even if policy makers in the jurisdiction will be required to do their own homework about how proposed rules will interact in their legal, cultural, political, and economic context.

### *C. Purpose 6: To Spread Higher-Order Values*

As discussed above, one of the unique features of the tax system is that it serves as a mechanism for promoting "high-order" values, including, as argued by scholars like William Barker, democracy, redistribution (or greater income equality), and economic stability.<sup>68</sup> A small cluster of tax scholarship uses comparative tax law as a means of analyzing how those higher-order values can be promoted and pursued through the tax system.<sup>69</sup>

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68. William B Barker, *Expanding the Study of Comparative Tax Law to Promote Democratic Policy: The Example of the Move to Capital Gains Taxation in Post-Apartheid South Africa*, 109 PA. ST. L. REV. 703 (2005).

69. See, e.g., Martin Daunton, *Land Taxation, Economy and Society in Britain and Its Colonies*, in COMPARATIVE PERSPECTIVES ON REVENUE LAW, *supra* note 52, at 197; Ana Paula Dourado, *General Report—In Search of Validity in Tax Law: The Boundaries Between Creation and Application in a Rule-of-Law State*, in SEPARATION OF POWERS IN TAX LAW 27 (Ana Paula Dourado ed., 2010); Ana Paula Dourado, *The Delicate Balance: Revenue Authority Discretions and the Rule of Law—Some Thoughts in a Legal Theory and Comparative Perspective*, in THE DELICATE BALANCE: TAX, DISCRETION AND THE RULE OF LAW, *supra* note 45, at 15; Hans Gribnau, *General Introduction*, in THE PRINCIPLE OF EQUALITY IN EUROPEAN TAXATION 1 (Gerard T.K. Meussen ed., 1999); Kathleen A. Lahey & Paloma de Villota, *Economic Crisis, Gender Equality, and Policy Responses in Spain and Canada*, 19 FEMINIST ECON., no. 3, 2013, at 82; Lisa Philipps, *The Globalization of Tax Expenditure*

Miranda Stewart's *The Tax Expenditure Concept Globally* is an example of scholarship focused on the possibility for tax law to spread higher-order values.<sup>70</sup> Stewart, Professor and Director of Studies (international tax and tax) at the University of Melbourne Law School, reviews the use of the tax expenditure concept and tax expenditure reporting in three middle-income countries—Chile, India, and South Africa.<sup>71</sup> Stewart's claimed purposes include to "discuss[] tax expenditure reporting . . . and consider[] the purpose and value of tax expenditure reporting for governments and civil society; the associated difficulties; and the issues and challenges that must be overcome."<sup>72</sup> Part of the article is focused on an account of the rise of tax expenditure reporting and Paul McDaniel's role in that rise.<sup>73</sup> A second major section reviews the approach to tax expenditure reporting in India, Chile, and South Africa.<sup>74</sup> This section reviews, country by country, the approach to tax expenditure reporting in each jurisdiction, and aligns with work that seeks to facilitate understanding of others' tax systems (purpose 2).<sup>75</sup>

From a comparatists' perspective, things get more interesting when Stewart turns to her analysis of what can be learned from the country case studies. Stewart chose the three countries because in each of them tax expenditure reporting developed in response to activist-led advocacy.<sup>76</sup> This differentiates her comparative work from

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*Reporting: Transplanting Transparency in India and the Global South*, in TAX, LAW AND DEVELOPMENT 182 (Yariv Brauner & Miranda Stewart eds., 2013); Rebecca Prebble & John Prebble, *Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law?: A Comparative Study*, 55 ST. LOUIS U. L.J. 21 (2010); Claudio Sacchetto, *Analysis of Fiscal Federalism from a Comparative Tax Law Perspective*, in TAX ASPECTS OF FISCAL FEDERALISM: A COMPARATIVE ANALYSIS 1 (Gianluigi Bizioli & Claudio Sacchetto eds., 2011).

70. Miranda Stewart, *The Tax Expenditure Concept Globally*, in THE PROPER TAX BASE: STRUCTURAL FAIRNESS FROM AN INTERNATIONAL AND COMPARATIVE PERSPECTIVE—ESSAYS IN HONOR OF PAUL MCDANIEL 47 (Yariv Brauner & Martin J. McMahon, Jr., eds., 2012).

71. *Id.* at 48.

72. *Id.*

73. The article was published in a collection prepared in McDaniel's honour. *Id.*

74. Stewart, *supra* note 70, at 58–73.

75. *Id.*

76. *Id.* at 58.



the doctrinal and descriptive work discussed earlier because her choice of countries is not justified by their connection to a tax feature (e.g., that they have all enacted a certain type of tax law) but rather because of an extra-tax activity (civil society activity) that has resulted in tax changes. Stewart is not an “insider” to any of the countries she compares. In some ways, that makes her assessment more even-handed (because she doesn’t have a home country bias). However, it also means she risks bringing an interpretive lens to the values and functions of tax law that are “outsider” to the countries she reviews.

In her articulation of the purpose of tax expenditure reporting, Stewart acknowledges the standard narrative about the usefulness of expenditure reporting as a mechanism for measuring spending through the tax system, but she urges readers to see the role of tax expenditure reporting as more substantial.<sup>77</sup> She argues that the primary value of tax expenditure reporting is to facilitate democratic debate.<sup>78</sup>

Stewart’s recognition of this role for tax (fostering democratic debate) leads her to recommend different design features for tax expenditure reporting. She suggests that governments should consider “periodically examin[ing] the cost and justification for its main tax expenditures in detail, with the goal of determining its distributional impact, if the cost is increasing or decreasing over time, whether there continues to be a good policy justification for the tax expenditure compared to other policy goals and instruments.”<sup>79</sup> In presenting distributional analysis, she urges governments to present the distributional consequences of tax expenditures by income, gender, and minority or regional status.<sup>80</sup> She also proposes that the tax expenditure budget be released before the annual budget to enable social society groups to respond to the tax expenditure budget as part of their activities in advance of the annual budget. Stewart suggests going beyond the standard reporting of a list of tax expenditures with an estimated cost to ensure that there can be critical scrutiny of those expenditures by civil society groups.<sup>81</sup> It is only by seeing tax’s function as connected to broader society values, like enhancing democratic debate, that these kinds of proposals might emerge.

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77. *Id.* at 75.

78. *Id.*

79. *Id.* at 77.

80. *Id.* at 82.

81. *Id.* at 77.



#### IV. EXPLANATORY COMPARATIVE TAX SCHOLARSHIP

This vein of comparative tax work is, at least in theory, primarily empirical. In it, the author seeks to explain why a country's laws are the way they are or seeks to assist us to understand how tax laws influence and create social realities. As a disciplinary matter, this kind of inquiry fits more comfortably with political scientists, sociologists, anthropologists, and other social scientists, which likely explains why so few legal academics have made this kind of empirical scholarly contribution.

*A. Purpose 7: To Explain Why a Country's Laws Are the Way They Are (and Why They Differ or Are the Same as Other Countries)*

Whether or not there is a "model" approach to the design of tax legislation that every country should aspire to adopt, there is significant variation among countries' approaches. Figuring out what explains those variations is another of comparative tax law scholarship's purposes.<sup>82</sup>

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82. See, e.g., Clinton Alley et al., *Politics and Tax Reform: A Comparative Analysis of the Implementation of a Broad-Based Consumption Tax in New Zealand, Australia and the United Kingdom*, 24 REV. L.J., no. 1, art. 3, 2014; John F. Avery Jones, *Corporate Residence in Common Law: The Origins and Current Issues*, in RESIDENCE OF COMPANIES UNDER TAX TREATIES AND EC LAW, *supra* note 40, at 121; Neil Brooks & Thaddeus Hwong, *The Social Benefits and Economic Costs of Taxation: A Comparison of High- and Low-Tax Countries* (Can. Ctr. for Pol'y Alts., Dec. 2006), <https://www.policyalternatives.ca/publications/reports/social-benefits-and-economic-costs-taxation> [<https://perma.cc/N4LS-KFVX>]; Allison Christians, *Historic, Comparative and Evolutionary Analysis of Tax Systems*, in SEPARAÇÃO DE PODERES E EFETIVIDADE DO SISTEMA TRIBUTÁRIO 287 (Misabel Abreu Machado Derzi ed., 2010); Wei Cui, *Taxing Indirect Transfers: Improving an Instrument for Stemming Tax and Legal Base Erosion*, 33 VA. TAX REV. 653 (2014); Wei Cui, *Taxing State-Owned Enterprises: Understanding a Basic Institution of State Capitalism*, 52 OSGOODE HALL L.J. 775 (2015); Rodney Fisher, *A Tale of Two Systems: The Divergent Histories of Australia and Canada*, in 2 STUDIES IN THE HISTORY OF TAX LAW 335 (John Tiley ed., 2007); Leandra Lederman, *Tax Penalties as Instruments of Cooperative Tax Compliance Regimes*, in SURCHARGES AND PENALTIES IN TAX LAW, *supra* note 40, at 31; Michael A. Livingston, *From Mumbai to Shanghai, with a Side Trip to Washington: China, India, and the Future of Progressive Taxation in an Asian-Led World*, 11 THEORETICAL INQUIRIES L. 539 (2010); Michael A. Livingston, *Convergence, Divergence, and the Limits of Tax Globalization: The Canadian Experience*, in THE QUEST FOR TAX

Much of this work is undertaken by political scientists, like Cedric Sandford;<sup>83</sup> nevertheless, some lawyers with an interdisciplinary bent commit scholarly energy to contribute to this literature.

While adherents to different comparative law philosophies might find themselves drawn to this purpose of comparison, it fits particularly well with those who seek to view law in its critical context. For example, Pier Giuseppe Monateri claims, the “new outline of the task of [c]omparative [l]aw is [to provide] an insight into the ‘ceaseless discursive warfare’ which is fought within legal cultures among competing groups.”<sup>84</sup> This kind of aspiration—to reveal the power dynamics that explain legal regulation—is one of the interests of scholars who approach their comparative work to achieve the purposes of explaining why a country’s laws are the way they are. Others are interested in whether environmental factors (e.g., demographics or language), the spread of ideas, economic structure, political actors, path dependency, or some combination of factors explain why countries’ laws develop in similar or divergent ways.

Steven Bank’s book, *Anglo-American Corporate Taxation: Tracing the Common Roots of Divergent Approaches*, is an outstanding

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REFORM CONTINUES: THE ROYAL COMMISSION ON TAXATION FIFTY YEARS LATER 199 (Kim Brooks ed., 2013); Lisa Marriott, *Justice and the Justice System: A Comparison of Tax Evasion and Welfare Fraud in Australia and New Zealand*, 22 GRIFFITH L. REV. 403 (2013); Ruben Martini, *Numerical Methodology in Comparative Tax Law: The Mathematical Model of Elasticity as a Thinking Model for Legal Comparisons*, 2 CAMBRIDGE J. INT’L & COMPAR. L. 506 (2013); Henry Ordower, *Horizontal and Vertical Equity in Taxation as Constitutional Principles: Germany and the United States Contrasted*, 7 FLA. TAX REV. 259 (2006); Diane M. Ring, *Institutional Aspects*, in BRICS AND THE EMERGENCE OF INTERNATIONAL TAX COORDINATION, *supra* note 40, at 469; Joseph J. Thorndike, *The Pitfalls of Comparative Tax Analysis*, 66 TAX NOTES INT’L 1188 (June 25, 2012); Diana van Hout, *Is Mediation the Panacea to the Profusion of Tax Disputes?*, 10 WORLD TAX J. 43 (2018); Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289 (2011).

83. CEDRIC SANDFORD, *SUCCESSFUL TAX REFORM: LESSONS FROM AN ANALYSIS OF TAX REFORM IN SIX COUNTRIES* (1993).

84. Pier Giuseppe Monateri, *Methods in Comparative Law: An Intellectual Overview*, in *METHODS OF COMPARATIVE LAW* 7, 21 (Pier Giuseppe Monateri ed., 2012) (quoting FREDRIC JAMESON, *POSTMODERNISM, OR THE CULTURAL LOGIC OF LATE CAPITALISM* 396 (1991)).

example of this kind of project.<sup>85</sup> Bank, a professor at UCLA's law school, brings an historical approach to the question of what explains the differing approaches taken by the United States and United Kingdom to the taxation of income earned in a corporation. By focusing on only two countries, Bank is able to explore in detail the underlying context in each country. The choice of countries removes at least some potential explanations from discussion—both are common law countries, and the United States inherited many of its laws and practices from the United Kingdom. Both countries also have well-developed capital markets, and there is frequent market interaction between the businesses in the two jurisdictions.<sup>86</sup>

Bank's book is designed to be both comparative and historical. To that end, it is organized to describe the origins and development of the corporate income tax in both countries over 200 years and then to consider possible explanations for their divergences and convergences. The historical approach adds depth to Bank's inquiry because he claims that the countries started their corporate tax histories in the same place—with considerable integration between the corporate and personal income taxes. In other words, their different trajectories were not obvious at the outset, which generates suspense: what happened to generate their unique paths?

The potential explanations for divergences in the U.S. and U.K. corporate tax paths are grouped under the following themes: profits (or how the growth of corporate profits affected the attention paid to corporate taxation relative to individual taxation), power over the corporation (or the role of the corporate manager relative to wealthy shareholders), and politics (or how the corporate tax system design varies when different political parties are in power). Bank uncovers some divergence in the underlying corporate conditions between the United States and the United Kingdom under the profits and power themes. For example, U.S. companies were more likely over time to retain substantial earnings instead of distributing those returns to shareholders. That difference (the increase in retained earnings) is part of the story of the divergence around power—U.S. companies developed a powerful managerial class. Additionally, share ownership became widely dispersed earlier in the United States

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85. STEVEN A. BANK, *ANGLO-AMERICAN CORPORATE TAXATION: TRACING THE COMMON ROOTS OF DIVERGENT APPROACHES* (2011).

86. *Id.* at 2.

than in the United Kingdom. These differences led American policy makers to focus on entity taxation (where the power resided), while British policy makers were more preoccupied with the wealthier, more elite shareholder class. Bank turns to politics (the third theme) in part because he decides that divergences in corporate structure and behaviour are insufficient to fully explain why the U.K. and U.S. corporate tax systems developed in differing ways. His analysis of the political differences between the countries focuses on the attractiveness of greater integration of the corporate tax for different political parties in each country over time. He also (but primarily in the introduction) suggests that the countries may have had different instincts about the incidence of the corporate tax.

Bank moves his analysis into the future by probing whether these explanatory variables might assist in predicting future directions for the corporate tax. In his concluding chapter he offers hope to those who might wish for a more harmonized corporate tax system worldwide by speculating that the factors that explained past divergences may be diminishing in importance (and we may therefore expect greater corporate tax convergence in the future).

*Anglo-American Corporate Taxation* provides a model for work with the purpose of explaining divergences (especially) in the evolution of countries' laws. Bank's work is detailed and careful. It relies substantially on comparative work undertaken in an interdisciplinary setting (drawing from sociology, economics, political science, and accounting), which makes sense because claims about what explains divergences are likely rooted in explanations beyond law and legal institutions and require a richer understanding of political, social, and economic context. Bank focuses on two countries, which is all he needs to support his claim (which is to explain the trajectory of those jurisdictions relative to each other). He has undertaken extensive historical research in each of those jurisdictions, delving into context well beyond formal legal expression. In terms of its limits, the book does not seek to present an ideal model for future reforms, nor would the work be particularly easy for a policy maker to digest in considering how to approach legal reform in their own jurisdiction.

### *B. Purpose 8: To Provide Insight into Social Reality*

There is an even smaller cluster of tax law comparative work that might be described as using tax law in an interdisciplinary context to help us learn something about human problems and public policy dilemmas

(outside of tax law altogether).<sup>87</sup> In scholarship identified under purpose 7 above, the author explicitly reviews possible explanations for similarities and divergences among countries' tax laws; in the social realities scholarship, scholars look to some of the same kinds of underlying realities (geography, language, demographics, et cetera) but do so not to provide a tight explanatory analysis of why laws look the way they do but instead (or also) for the insights that can be drawn about those social realities from a study that includes a focus on law. This is, in some measure, akin to the kind of "social realities" approaches undertaken by comparative law socio-legal scholars like Annelise Riles.

Assaf Likhovski's comparative and historical reflection on tax collection and enforcement in the context of Mandatory Palestine and Israel offers an illustration of this approach.<sup>88</sup> In his work, Likhovski documents the changing attitudes toward the payment of taxes through the Ottoman, Mandatory Palestinian, and Israeli regimes from the late 19th century until 1985. Although the state once benefitted from a kind of intimacy with citizens, which facilitated largely voluntary financial transfers to it, with social and economic change in the 1960s, voluntarism needed to be replaced with increasingly legally-enforced

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87. See, e.g., Tsilly Dagan, *Ordinary People, Necessary Choices: A Comparative Study of Childcare Expenses*, 11 THEORETICAL INQUIRIES L. 589 (2010); ANTHONY C. INFANTI, OUR SELFISH TAX LAWS: TOWARD TAX REFORM THAT MIRRORS OUR BETTER SELVES (2018); Marjorie E. Kornhauser, *Wedded to the Joint Return: Culture and the Persistence of the Marital Unit in the American Income Tax*, 11 THEORETICAL INQUIRIES L. 631 (2010); Yoram Margalioth, *The Social Norms of Tipping, Its Correlation with Inequality, and Differences in Tax Treatment Across Countries*, 11 THEORETICAL INQUIRIES L. 561 (2010); Edward McCaffery, *Where's the Sex in Fiscal Sociology?: Taxation and Gender in Comparative Perspective*, in THE NEW FISCAL SOCIOLOGY: TAXATION IN COMPARATIVE AND HISTORICAL PERSPECTIVE 216 (Isaac William Martin et al. eds., 2009) (for a review, see Lynne Oats, *Book Review: The New Fiscal Sociology: Taxation in Comparative and Historical Perspective*, 2012 BRIT. TAX REV. 117); ANN MUMFORD, TAX POLICY, WOMEN AND THE LAW: UK AND COMPARATIVE PERSPECTIVES (2010); ANN MUMFORD, TAXING CULTURE: TOWARDS A THEORY OF TAX COLLECTION LAW (2002); Henry Ordower, *The Culture of Tax Avoidance*, 55 ST. LOUIS U. L.J. 47 (2010); Claire Young, *Taxing Times for Women: Feminism Confronts Tax Policy*, 21 SYDNEY L. REV. 487 (1999).

88. ASSAF LIKHOVSKI, TAX LAW AND SOCIAL NORMS IN MANDATORY PALESTINE AND ISRAEL (2017).

compliance measures. Concurrent with this change was the rise of the tax profession, which saw its role not as facilitating the civic duty of citizens to yield income to the state but instead as facilitating reduced tax obligations. Likhovski describes his orientation to comparative study in this work as “reflect[ing] my belief that taxation is not only a revenue-raising tool or an incentive-providing mechanism, but also a method for social construction—a way to create a shared identity and common notions of citizenship and community.”<sup>89</sup>

Work with the purpose of providing insight into social realities has some similarities to comparative tax work with other purposes at their centre. Like others, Likhovski identifies and justifies his choice of jurisdictions. He deploys comparativism with the aim of learning something new about the world. The book reveals his deep understanding of the comparator jurisdictions and their histories, suggesting that he has firmly lodged himself as an “insider” to the cultures and histories of the jurisdictions and communities on which he most focuses his analysis.

Nevertheless, Likhovski's work steps out from the other comparative tax scholarship identified in this Article in several ways. First, he reaches beyond conventional legislative and judicial sources. He adds depth to the tax collection story by offering references to film and literature of the relevant eras and by paying attention to the roles of tax actors, including cabinet ministers, judges, officials, tax farmers, and lawyers. This approach (expanding what constitutes a “source” relevant for comparative tax study) could fit with most of the purposes, yet few scholars delve into less conventionally legal sources to enhance their analysis. Second, Likhovski's work, while framed around tax law, is not necessarily *about* tax law in the way that work with other purposes is. Put another way, Likhovski's primary purpose does not seem to be that we will learn something new about how to effectively collect taxes. Instead, the driving motivation for his work seems more connected to our sense of the role of the state in citizens' lives.<sup>90</sup> Tax law is just a foil through which to garner insights about the changing nature of that relationship. It is this feature of his work that distinguishes his purpose as distinctive. While this taxonomy of purposes is designed to offer an alternative account of the work of tax comparatists, it seems more likely

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89. *Id.* at 14.

90. Reflecting this orientation, the final question he poses in his introduction is “How were taxation and its law related to changing notions of civic identity and citizenship?” *Id.* at 6.

that Likhovski's work aligns more closely with a cultural approach to comparative law than some of the other purposes, which may have more in common with functionalist approaches.

## V. LESSONS FROM COMPARATIVE TAX LAW'S PURPOSES

Not surprisingly, a review of the comparative tax law scholarship reveals that it aligns in a broad way with legal scholarship: much of it is descriptive (or doctrinal) or normative and a smaller strand is explanatory (or empirical). Although the categories are far from water-tight, most articles can be classified as primarily within one of the eight identified purposes.

A taxonomy based on the purpose of the scholarship instead of on its theoretical orientation (or its alignment within the conventional comparative law schools of thought) enables authors to resolve more readily some of the other debates of comparative law: What units should be chosen? How many countries are necessary? How much knowledge does the comparatist need about the country (and its context)? What knowledge of other disciplines is necessary for the scholar to effectively address the purpose?<sup>91</sup>

The three doctrinal and primarily descriptive purposes require substantial knowledge about the technical tax system of the comparator countries. Outstanding work of this sort reflects substantial diligence about the formal law "on the books" as well as about how that law is interpreted and applied by local decision makers and lawyers. The author can describe the law of the comparator countries in ways that enables the reader to see its nuances and to understand how different countries have resolved their tax design issues differently. For scholars who attempt to draw general conclusions about (tax) law, the project will require understanding the tax laws of several countries in some detail; it is only through careful, sustained, comparative study and reflection that a scholar may be able to accurately make sense of the underlying structures of tax law. As a result, one imagines that purpose 3 work is better suited to more senior scholars with substantial prior comparative experience.

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91. For a review of these common questions of comparative law, see Mark Van Hoecke, *Methodology of Comparative Legal Research*, 12 L. & METHOD, no. 4, 2015.



The normative and empirical projects are likely better undertaken once a scholar has spent some time pursuing descriptive or doctrinal work. For these projects, a thorough understanding of the legal context is a baseline. The scholarship that seeks to press for or support legal change is often highly pragmatic in design: the country that is the focus of the advocacy is considering law reform or an issue is before the courts. To support what is often a more extended argument in favour of change, the author also marshals evidence about practices in at least one other jurisdiction. Scholarship seeking to achieve this purpose is most useful when the author is able to explain why the comparator jurisdiction's approach is superior. That generally requires either demonstrating how it is effective in the other jurisdiction (with appropriate attentiveness to the context in that jurisdiction) or knowing enough about the home jurisdiction to be able to offer grounded explanations for why the advocated approach will result in superior results.

Projects that search for a common future require a firm sense of the relatedness of the jurisdictions selected for study. While there may be good reasons for all countries in the world to harmonize at least some aspects of their tax systems, the claims of scholars who press for a shared future tend to have consolidation, harmonization, or coordination of some narrower set of countries in mind. For this work to be useful, presumably it needs to have traction with policy makers. To that end, ensuring that the work is tied to a rich sense of the political, social, and economic context of the jurisdictions under study would enhance the quality of the work. The number of countries under study may be as few as two, or as many as comprise a cluster of countries for whom a shared or coordinated legal regime make sense.

Only a small sample of scholarship has as its core purpose the spread of high-order values. In this case, the work of the scholar is necessarily interdisciplinary, building often on the insights of philosophy, sociology, and political science. As with purpose 3, purpose 6 requires considerable previous scholarly experience, and likely is the kind of project better undertaken when a scholar has had previous comparative experience or perhaps when they have a substantial period of time to devote to the project.

Explanatory projects are among the most complicated. They demand a high level of expertise about the broader legal culture in the comparator jurisdictions; they are perhaps best undertaken with a smaller number of comparator jurisdictions. Additionally, the author must be able to work with at least some interdisciplinary skills—this work cannot rest solely on legal knowledge. Choice of countries matters. There

are so many possible variables that it makes sense to reduce the scope of possible explanatory factors.

There is nothing about any of these purposes that suggests comparator countries should be drawn from the same families or traditions or that they should be countries with similar economic structures or administrative capacities, for example. Instead, in each case, scholars should have reference to the work on legal families and traditions and consider the value in using countries with similar (or different) trajectories. It may be, for example, that in reviewing a highly technical area of tax law and where the scholar seeks to support legal change, a country with a similar legislative and political history would be a better comparison because the chance of an effective transplant may be stronger; or a scholar who wishes to learn more about their own system's approach to a technical issue may find a country with a very different legal context to be informative in revealing alternative possible solutions to the same dilemmas.

There are a set of natural barriers that preclude effective study of the tax laws of some countries. The most obvious is language. If the scholar is not fluent in the language of the jurisdiction, independent comparative work is close to impossible. Some work is available in translation, but unless the scholar's language is one of the languages used in an official translation, the source materials may not accurately reflect the laws of the jurisdiction. In addition, obtaining other information—even data gathering as simple as talking informally to actors in the country—can be close to impossible. In these cases, comparative work can at best be modest. To pursue something more serious, the scholar must work collaboratively with others. Another perhaps less obvious natural barrier is access. If the country does not have a good system for making its legal framework, case decisions, and administrative guidelines accessible in a timely way, it will be difficult for the scholar to know that they are working with reliable data unless they have become an insider to that country.

A few gaps in the comparative tax literature might be identified with the aim of inspiring future work. First, there is nothing about the purposes of comparative tax law work that suggests that it should focus on formal legal regulation. Most of the work identified for the data is preoccupied with legislation (with a smaller portion focused on case law). Very little of the work committed any time to the broader political and institutional context for tax-law-making, the role of tax actors (like revenue agents, tax litigators, tax lawyers and accountants, or taxpayers), or administrative functions and positions, to say nothing of

attempting to provide some of the social or economic context that informs policymaking in tax law. Identifying which of the eight purposes might motivate a comparative project, however, says nothing about what should be the subject of the comparison (formal laws, institutions, the operation of “law on the ground,” the attitudes of legal elites, and so on). Some of the purposes though (for example, work that suggests a tax law might be appropriately transplanted to the author’s home jurisdiction) suggest that greater attention to the underlying context of tax regulation would enhance the quality of the work produced.

Second, despite the common pressure on low- and middle-income countries to adopt variants of high-income country tax rules (for example, general anti-avoidance provisions or thin capitalization rules), there is almost no literature that delves into the context of low- and middle-income countries in detail. And a much smaller amount of that already small body of work is authored by scholars in low- and middle-income countries. The literature cries out for more work, across all purposes, that assists our understanding of how tax law (read broadly to include tax institutions and practices) operates differently in different jurisdictions with attention to geopolitics and global income inequality.

Third, although the lack of interdisciplinary and empirical legal scholarship has been decried for some time,<sup>92</sup> comparative tax scholarship has been slow to respond. One of the striking observations about the body of comparative tax law work is how *legal* it is, relying primarily on expressions of formal law and using conventional legal methods to approach the identified project. While many scholars refer to the work of scholars in other disciplines (especially economics), few of them approach their projects in ways that build from the scholarly insights of other disciplines.<sup>93</sup> And while some of the purposes require empirical work by their nature (for example, those that seek to explain why laws are the same or different), scholarship that seeks to achieve those purposes is the smallest of the clusters.

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92. See, e.g., HARRY W. ARTHURS, *LAW AND LEARNING: REPORT TO THE SOCIAL SCIENCES AND HUMANITIES RESEARCH COUNCIL OF CANADA* (1983); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002).

93. For a discussion of the difficulties of meaningful interdisciplinary comparative research, see Jaakko Husa, *Interdisciplinary Comparative Law—Between Scylla and Charybdis*, 9 J. COMPAR. L. 28 (2014).

Finally, comparative tax as a discipline could use more contributions from women scholars. While there are some women writing in the field, few do so in a sustained way. The simple explanation may be that there are still fewer women in the tax academy (because, presumably, of yet-to-be-fully-displaced assumptions about what areas of law are appropriate for women). Or it's possible that the participants in comparative law as a general discipline engage in some similar exclusionary practices. Another explanation is that some of the purposes (for example, purpose 3, which suggests that scholars might be able to generalize about features of tax systems on a global scale require a confidence (or hubris or access to international experience) that has been ill-fit for women scholars (or precluded)). Regardless, it is hoped that demonstrating the broad range of possible purposes motivating comparative tax law projects will inspire more women and scholars from middle- and low-income countries to contribute to the work in this field.

Ultimately, this Article is predicated on the assumption that the world needs more and better comparative tax law scholarship. Comparative tax scholarship, with its ability to introduce us to a broader community of colleagues and ideas from around the world, feeds intellectual curiosity; when pursued open-mindedly, it can offer new solutions to some of the (tax) world's most pressing problems; and when purposed with purpose, it can enable others to read and evaluate the work effectively. These are conditions of excellent scholarship.